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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 288

SID W. RICHARDSON, ET AL

Petitioners,

VS.

KEITH KELLY, RECEIVER,

Respondent.

Petition For Writ of Certiorari to the Supreme Court of Texas, and Brief in Support Thereof

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Sid W. Richardson, Richardson Oils Inc., Houston Transportation Company, Mid-Co Gasoline Company, K. C. Gray and L. W. Fritz, for themselves and to the extent authorized by law as representatives of other subscribers similarly situated, present this their petition for writ of certiorari to be directed to the Supreme Court of the State of Texas, to review a judgment of that Court rendered December 29th, 1945 (rehearing denied February 13th, 1946), affirming a judgment of the 53rd District Court of

Travis County, Texas, in favor of Respondent and against Petitioners. Time within which to file petition for certiorari has been extended by order of the Court until July 11, 1946.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This action in the nature of a Bill of Review was brought by petitioners in the District Court of Travis County, Texas, to set aside a judgment theretofore rendered by said Court establishing the insolvency of the National Indemnity Underwriters of America, a reciprocal insurance exchange, and fixing the liability of the policy holders at said exchange to an assessment. (R. 148).

The original suit had been brought by Keith Kelly, Receiver of the Exchange, against twenty-eight former policyholders who were sued individually and as representatives of all other policyholders. Petitioners were not named as defendants in said cause, and were neither cited nor served in that proceeding. (R. 510).

Attacking the judgment rendered in the prior proceeding these petitioners filed the case at bar, alleging (1) that the former judgment establishing the *several* liability of the policyholders of the Reciprocal to assessment, if held binding on these petitioners deprived them of their property without due process of law, and (2) that because of the fraud

of the Receiver (in conducting the litigation, and in securing said judgment), petitioners were not in fact adequately represented by the parties who were present, and therefore have been deprived of their property without the due process of law guaranteed them under the Federal Constitution. (R. 172).

Trial of the instant Bill of Review before the Court without a jury, resulted in a judgment that petitioners were bound by the adjudication in the class suit, and on the cross-action of the Receiver judgment was rendered against petitioners for the amount of their respective assessments under the former judgment. (R. 179).

An appeal was taken by petitioners to the Court of Civil Appeals which affirmed the action of the trial court. (R. 752). Petition for Writ of Error was granted by the Supreme Court of Texas, where the judgment was again affirmed in a divided opinion, Chief Justice Alexander and Associate Justice Sharp dissenting. (R. 817).

The majority opinion holds that the Petitioners are bound by the prior adjudication of the insolvency of the Exchange, and of their several liability as subscribers to assessment, notwithstanding the fact that they were not parties to the suit, nor served with process therein. This holding is premised on the validity of the suit as a class action. The directly contrary holding of this Court in *Christopher v. Brusselback*, 302 US 500, 82 L. Ed. 388, 58 Sup. Court 350, is dismissed as being not in point. (R. 813).

The dissenting opinion by the Chief Justice points out that *Christopher vs. Brusselback, supra*, is squarely in point on almost identical facts, and that the majority opinion is in direct conflict therewith. (R. 828).

The dissent held further that even if the suit had been maintainable as a class action, the judgment secured therein was void because of the wrongful conduct of the Receiver first in selecting representative defendants whose interests were negligible, and then negotiating settlements with those selected so as to preclude the possibility of any real or active defense to the suit. (R. 820).

The majority opinion dismisses the uncontradicted proof of the Receiver's conduct by holding that the original class suit judgment recited that the absent and uncited subscribers were "fairly and truly represented herein by the named defendants appearing and answering," and that such recitation was conclusive. (R. 816).

II.

JURISDICTIONAL STATEMENT

Judisdiction of the Supreme Court of the United States is invoked pursuant to Judicial Code Sec. 237(b), as amended by the Act of February 13, 1925, 28 USC Sec. 344(b), 43 Stat. 937, reading in part:

"(b) It shall be competent for the Supreme

Court by certiorari to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest Court of the State in which a decision could be had * * * Where any title, right , privilege or immunity is specially set up or claimed by any party under the Constitution * * *."

Petitioners in the Bill of Review filed by them to set aside the prior judgment establishing the insolvency of the inter-insurance exchange, and the several liability of the subscribers thereto to an assessment, alleged that they were not named as parties in said suit nor served with process therein, and that the former judgment if held binding upon them, deprived them of their property without due process of law. Petitioners further alleged that the course of the proceeding actually pursued by the Receiver in filing said original class suit, and in prosecuting it to judgment was such as to render the judgment obtained void as to these petitioners under the due process clause of the 14th Amendment to the Federal Constitution. (R. 172)

The due process question was preserved by appropriate assignment in the Court of Civil Appeals (R. 151), in the Supreme Court of Texas (R. 198), and duly assigned as error in motion for rehearing filed in that Court. (R. 242).

The judgment of the Supreme Court of Texas to

be reviewed is dated December 29th, 1945, motion for rehearing was overruled on February 13th, 1946, R. 846). The time within which to file petition for certiorari was extended to and including July 11th, 1946, by order of this Court dated May 9th, 1946.

The cases believed to sustain such jurisdiction are as follows: *Christopher vs. Brusselback*, 320 U.S. 500; *Hansberry vs. Lee*, 311 U. S. 32, *Pennoyer vs. Neff*, 95 U. S. 715.

III.

QUESTIONS PRESENTED

The first question presented is whether petitioners are bound by the adjudication in cause No. 63621, in their absence, of the existence and extent of the insolvency of an inter-insurance or reciprocal exchange at which they were subscribers, and of their several liability to assessment, and the amount of the assessment.

The second question presented is whether the Supreme Court of Texas, by its adjudication that petitioners in this case are bound by a judgment rendered in an earlier litigation (cause No. 63621) to which they were not parties, has deprived them of the due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A.

The majority opinion of the Supreme Court of Texas, decided a Federal question of substance under the 14th Amendment, as to the authority of named and cited defendants to stand in judgment for unnamed and uncited defendants, in favor of respondent by holding that petitioners were bound by the adjudication of the existence and the extent of insolvency of an inter-insurance or reciprocal exchange at which they were subscribers, and of their several liability to assessment and the amount thereof in a prior suit to which petitioners were not parties, which decision is not in accord with the decisions of this Court including the case of *Christopher vs. Brusselback*, 302 U. S. 500, *Hansberry vs. Lee*, 311 U. S. 32, *Old Wayne Mutual Life Insurance Company vs. McDonough*, 204 U. S. 8, and *Pennoyer vs. Neff*, 95 U. S. 714.

B.

The majority opinion of the Supreme Court of Texas decided a Federal question of substance under the 14th Amendment as to the authority of those named as representatives of a class to represent the interest of the absent members of the class, in favor of respondent, by holding that the deliberate omission as defendants of those whose interests were substantial, and the selection as defendants of those

whose interests were negligible and the convert negotiations of settlement with those so selected, effectively eliminating all contest of the suit, constituted such conduct of the litigation as to insure the full and fair consideration of the common issues, which decision is not in accord with the decisions of this Court, including the cases of *Hansberry vs. Lee*, 311 U. S. 500, *Smith vs. Swormstedt*, 16 How. 288, and *U. S. of America vs. Dick Johnson*, 319 U. S. 302.

C.

The majority opinion of the Supreme Court of Texas decided a Federal question of substance in a way probably not in accord with the applicable decisions of this Court, in that it held that these petitioners, and others similarly situated, are legally bound by the judgment rendered in a suit to which they were not parties, and of which they had no notice, where the record affirmatively shows without controversy that the procedure adopted in such asserted class action was not such as to fairly insure the protection of the interests of parties made defendants by representation only, which decision is probably not in accord with the decisions of this Court including the cases of *Hansberry vs. Lee*, 311 U. S. 500, *Smith vs. Swormstedt*, 16 How. 288, *U. S. vs. Dick Johnson*, 319 U. S. 302.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of Texas, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the

proceedings of the said Supereme Court of Texas had in the case numbered and entitled on its docket No. A-196, *Sid W. Richardson, et al Petitioners, vs. Keith Kelly, Receiver, Respondent,* to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Supreme Court of Texas be revised by the Court, and for such further relief as to this Court may seem proper.

Dated the 4th day of July, 1946.

SID W. RICHARDSON,
RICHARDSON OILS, INC.,
HOUSTON TRANSPORTATION COMPANY,
MID-CO GASOLINE COMPANY,
K. C. GRAY,
L. W. FRITZ,
By John M. Scott
John M. Scott, Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURTS BELOW

The opinion in the Court of Civil Appeals for the Third Supreme Judicial District of Texas is reported in 179 SW (2d) 991 (R. 752). The

majority and dissenting opinions of the Supreme Court of Texas are reported in 191 SW (2d) 857. (R. 801).

II.

JURISDICTION

(1) The date of the judgment to be reviewed is December 29th, 1945. (R. 834). Motion for rehearing was overruled on February 13th, 1946. (R. 846). The time within which to file petition for certiorari was extended to and including July 11th, 1946, by order of this Court dated May 9th, 1946.

(2) The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code Sec. 237(b), as amended by the Act of February 13, 1925, 28 USC Sec. 344(b), 43 Stat. 937.

(3) Petitioners, in the Bill of Review filed by them to set aside the prior judgment establishing the insolvency of the insurance exchange, and their several liability as subscribers to assessment, alleged that they were not named as parties in said suit, nor served with process therein, and that the former judgment, if held binding upon them, deprived them of their property without the due process of law guaranteed by the 14th Amendment to the Constitution of the United States. (R. 172). Petitioners further alleged that the course of the proceeding actually pursued by the Receiver in filing said

original class suit, and in prosecuting it to judgment, was such as to render the judgment obtained void as to these petitioners, under the due process guaranty of the 14th Amendment to the Federal Constitution. (R. 173).

The due process question was presented by appropriate assignment of error in the Court of Civil Appeals (R. 751), and in the Supreme Court of Texas (R. 798) and duly assigned as error in the motion for rehearing filed in that court. (R. 842).

(4) The cases believed to sustain such jurisdiction are as follows: *Christopher vs. Brusselback*, 320 U. S. 500, 82 L. Ed. 388, 58 Sup. Court 350; *Hansberry vs. Lee*, 311 U. S. 32, 85 L. Ed. 22, 61 Sup. Court 115; *Pennoyer vs. Neff*, 95 U. S. 715, 24 L. Ed. 565.

III.

STATEMENT OF THE CASE

The summary statement of the matter involved in the preceding petition (p. 2 to 4) is adopted and made a part of this brief. Supplementing that statement petitioners would show further that the original class suit, being cause No. 63621, was filed in 1940, ~~May, 1939~~, by the Receiver, the named defendants being sued individually and as representatives of 3200 other subscribers. (R. 554). On ~~May~~ March 8th, 1941, judgment was rendered in the cause against the named de-

fendants as well as all the members of the class. The judgment after finding as a fact the insolvency of the National Indemnity Underwriters, adjudicated the liability of the subscribers for an assessment to make up the losses. (R. 664). The judgment in the case became final on April 8th, 1941, no appeal therefrom having been taken. The present Bill of Review was filed in the same Court on May 16th, 1941, by Sid W. Richardson and Richardson Oils, Inc., the other petitioners subsequently intervening. (R. 804). The Receiver in said cause filed his cross-action, seeking to recover from petitioners severally the amounts of their respective assessments in the event the prior judgment was held to be valid. (R. 103).

It is the ruling of the trial court, affirmed on appeal by the Supreme Court of Texas, that petitioners were bound in their absence by the judgment in cause No. 63621 that these petitioners complain of.

A brief resume of the history of the litigation is deemed important. Prior to the filing of the class suit here complained of the Receiver Kelly had brought a suit in the same trial court, being cause No. 61778, styled Keith Kelly, Receiver vs. Sid W. Richardson, et al, in which Richardson, Richardson Oils, Inc., and Houston Transportation Company and one hundred eighty-nine others were named as defendants. (R. 510). Petitioners contested that suit and prepared to defend it (R. 321-23), but on December 9th, 1939, the Receiver caused it to be dismissed. (R. 243). Thereafter on July 11th, 1940, the Receiver Kelly instituted the complained of class suit, being cause

No. 63621, naming twenty-eight defendants individually and as class representatives of the other subscribers. Petitioners who were parties to the first suit were deliberately omitted from the latter. (R. 266).

Of those named as defendants, including three who intervened, twelve had liabilities of less than $100.00; eleven had liabilities of less than $200.00; three had liabilities of less than $300.00, and the claims against the other five ran from $441.00 to $801.00. (R. 821).

During the pendency of the proceeding the Receiver dismissed two defendants, six defendants defaulted, twenty defendants filed answers. (R. 821). On the day of the trial five of them with the approval of the Receiver, paid into Court the small amounts due by them, and thereafter made no defense. (R. 821). Prior to the trial the Receiver discussed settlement with ten of the other defendants who filed answers. Thereafter these ten defendants made no further contest. (R. 821). On the day of the trial the Receiver made an agreement with the attorney representing one defendant and the three interveners, that if he would not resist the suit and would suffer Kelly to recover judgment, that no execution would ever issue against his clients. (R. 286). One defendant with a liability of only $124.00 appeared at the trial, but presented no defense and did not give notice of appeal. (R. 219). The three remaining defendants excepted to the order and gave notice of appeal. Two of them with whom settlement agreements had been discussed prior to the trial were settled with shortly

after the order became final for much less than the amount adjudged against them. (R. 260). The remaining defendant who had excepted to the order had a liability of only $18.00. The result was that no one prosecuted an appeal from the judgment.

The majority opinion of the Texas Supreme Court held that regardless of the uncontroverted proof of the facts outlined above, in view of the recitation in the original class judgment that the class subscribers had been "fairly and truly represented by the named defendants appearing and answering," the question had been foreclosed. (R. 816).

IV.

SPECIFICATION OF ERRORS

1. The Supreme Court of Texas erred in holding that petitioners were bound, in their absence, by the prior judgment in cause No. 63621.

2. The Supreme Court of Texas erred in holding that said cause No. 63621 was maintainable as a class suit, the object of the suit being to enforce the *several* obligations of the subscribers of a reciprocal insurance exchange to assessment.

3. The Supreme Court of Texas erred in holding that the judgment in the class suit was binding on the absent and uncited subscribers in view of the uncontroverted proof of the Receiver's conduct in tampering with and in covertly negotiating settlement

agreements with the named defendants so as to thwart any real assertion of a defense in behalf of the absent members of the class.

V.

ARGUMENT

SUMMARY OF THE ARGUMENT

Under Points One and Two petitioners assert that the class suit device was not available to the Receiver to enforce the *several* obligations of the subscribers. The purpose of the orginal suit was to impose a personal and several liability on the members of the class for the debts of the defunct concern, and was therefore an action in personam in which jurisdiction over the person of petitioners was essential to the validity of the judgment.

There being no statutory provision authorizing the imposition of an assessment on petitioners without notice to them and without an opportunity to defend, the procedure adopted in the class suit was unsanctioned and the judgment secured thereby, if held binding, deprives petitioners of their property without due process of law.

Under Point Three petitioners concede, arguendo, the availability of the class suit device under the circumstances here involved, but assert the proposition that due process requires that the suit be fairly and honestly conducted, and that a full, fair and impartial trial be had in which the interest of the ab-

sent members of the class shall receive full and complete protection. Where the proponent of a class suit deliberately excludes from the suit defendants whose interests are substantial enough to insure their appearing to contest the suit, and instead selects as representative defendants those whose interests are negligible and then proceeds to tamper with and covertly negotiate settlements with those selected, stifling the presentation of any defense whatsoever in behalf of the absent and excluded members of the class, the judgment thus procured, cannot, consistent with the requirements of due process, bind the absent members.

POINTS ONE AND TWO

(Restated)

The Supreme Court of Texas erred in holding that the prior suit in Cause No. 63621 was a valid class suit, and that petitioners though not parties to said suit nor served with process therein, were bound by the judgment rendered in said cause.

ARGUMENT

The policyholders of the National Indemnity Underwriters became subscribers thereto by executing a power of attorney, by which each of them severally appointed an attorney in fact to effect the exchange of insurance. The applicable State law, Chapter 20, Title 78, Revised Civil Statutes of Texas, 1925, is found in the appendix hereto.

Petitioners in the State Courts have urged that the

applicable power of attorney on file with the State Board of Insurance Commissioners provided against contingent liability, and was entirely different from the power of attorney submitted in evidence in the class suit by the Receiver, and under which the obligation to contribute pro rata to pay the losses of the exchange to the extent of one additional premium was held to exist.

The question of meritorious defense, however, is not necessary to a decision of the Due Process questions before this Court. Petitioners here assert the proposition that in any suit to enforce a liability against them individually, due process of law guarantees to them the right to contest every step essential to the establishment of that liability, and that a judgment rendered against them without their having been heard is not binding upon them.

The provisions of the power of attorney relied on by the Receiver, authorized the attorney in fact to act for the subscribers in the exchange of insurance contracts. It provides in part as follows:

> "Provided, however, that the amount exchanged for me on any one risk shall in no case exceed the amount hereinafter subscribed by me; and provided further that the total amount exchanged for me during any year shall not exceed double the amount of my premiums for that year.
>
> "Provided, however, that said attorney shall not have power to bind jointly subscribers, but

> he shall have power to bind severally each subscriber." (R. 572).

The petition in cause No. 63621 asserted that under the foregoing power of attorney each subscriber became bound severally but not jointly for his pro rata part of the indemnity granted by the Association not to exceed one additional annual premium on the policy issued to him. (R. 568).

The judgment in cause No. 63621, found that the Exchange was insolvent, that the subscribers were bound severally but not jointly to the extent of one additional annual premium, that an assessment equal to one additional premium was necessary, and decreed in favor of the Receiver for such assessment. The judgment further provided:

> "It is further ordered, adjudged and decreed by the Court that the liabilities decreed herein shall be several as to each of such subscribers * * * and not joint." (R. 665).

The question decisive of the case now before the Court is whether petitioners are bound by the foregoing adjudication, in their absence, of the Associations insolvency, the extent thereof and of their liability to assessment and the amount thereof.

It is a cardinal principle of our jurisprudence that no person shall be concluded by a judgment of a Court either in respect to his person or property, in any litigation in which he is not designated as a party, or to which he has not been made a party by

service of process or appearance. *Hansberry vs. Lee*, 311 U. S. 32, 85 L. Ed. 22, 61 Sup. Court 115. *Scott vs. McNeal*, 154 U. S. 34; 38 L. Ed. 896; 14 Sup. Court 1108; *Pennoyer vs. Neff*, 95 U. S. 714; 24 L. Ed. 565; *Christopher vs. Brusselback*, 302 U. S. 500; 82 L. Ed. 388, 58 Sup. Court 350.

To the general rule there is an exception which permits a Court under some circumstances to render a judgment in a class suit to which some members of the class are parties, which binds other members of the class who are not named as parties thereto. *Hansberry vs. Lee*, 311 U. S. 32, 86 L. Ed. 22, 61 Sup. Court 115; *Smith vs. Swormstedt*, 16 How. 288, 14 L. Ed. 942; *Supreme Council vs. Green*, 237 U. S. 531, 59 L. Ed. 1089, 35 Sup. Court 692; *Supreme Tribe of Ben Hur vs. Cauble*, 255 U. S. 356, 65 L. Ed. 673, 41 Supreme Court 338; cf. *Christopher vs. Brusselback, 302 U. S.* 500, 82 L. Ed. 388, 58 Sup. Court 350.

The representative or class suit is a creature of equity. It is not available to a party as a mere convenience to avoid a multiplicity of suits. It grows out of the necessities of the case, and is permitted upon the assumption that those who are sued as representatives of others who are absent have such an identity of interest that the natural instinct for self-preservation will cause the representative, in protecting himself, to protect at the same time, the interest of all others whose rights are involved.

The present Federal and Texas rules of procedure

authorizing the use of the class suit device under certain stated circumstances introduced no new principles of law but merely expressed the operating principles by which the Courts have always been guided in dealing with class suits.[1] The rules therefore are definitive of the equity practice as it has always existed, and disclose three distinct forms of the class action.

The first is the true class action where the rights sought to be enforced are joint, common or secondary.

The second or hybrid class suit deals with the adjudication of claims of property.

The third or spurious class suit is authorized where the right sought to be enforced is *several* and there is a common question of law and fact affecting the *several rights* and a common relief is sought. The first two are really the proper cases of class suits where the result is held to be res adjudicata as to those who are represented.

In the third it is not binding, being merely a permissive joinder device.[2]

A few cases will illustrate the character of the

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[1]E. R. Sunderland, 45 W. Va. L. Q. 5. Franki, Vernon's Texas Rules of Civil Procedure, p. 60 Et. Seq.

[2]Address Dean Clark, member of the Advisory Committee speaking before the Institute on Federal Rules of Civil Procedure held in Washington, D. C., in 1938. **Farmers Coop vs. Socony Vacuum Oil Co.**, 133 Fed. 2d 101, **Oppenheimer vs. H. J. Young Co.**, 144 Fed. 2d 387; **Hunter vs. Southern Indemnity Underwriters**, 47 Fed. Supp. 242; 2 **Moore's Federal Practice**, Par. 23.03-23-04, pgs. 2227-2245.

common or joint jural relationship which must exist in order to base the true class suit.

In *Hartford Life Insurance Co. vs. Ibbs*, 237 U. S. 662, the insurance company had made a larger assessment against its policy holders than was necessary to pay existing claims. Some of the policyholders brought suit on the part of all others of the class to require the company to distribute the accumulated fund on hand among the policyholders instead of retaining it for the payment of future claims. The Supreme Court held that this was a proper class action because the ownership of the fund thus accumulated was one of common interest to all the policyholders.

In *Smith vs. Swormstedt*, 16 How. 288, 14 L. Ed. 842, the suit was brought by some members of the Methodist Episcopal Church South for themselves and as representatives of all other members against some of the members of the Methodist Episcopal Church of the United States as representatives of all other members thereof for a partition of jointly owned property. This was held to be a proper class action because it involved property in which all of the members of the class had a common interest.

In *Supreme Tribe of Ben Hur vs. Cauble*, 255 U. S. 356, 65 L. Ed. 673, 41 Supreme Court 338, the suit was brought by 574 members of Class A to enjoin the use of trust funds of the defendant in which other members of Class A and the complainants had a common but indivisible interest, and attacking a

plan of reorganization of the society. The Court held that the suit was a proper class action because it involved the funds of the organization in which all the members had a common interest.

The distinction between this type of case and the case at bar is readily apparent. Each of the foregoing cases involved the rights of the members of the alleged class in a fund or in property owned by them in common. None of the cases involved an attempt to recover on the *several obligations* of the members of the alleged class. In the case at bar the subject matter is not a fund which exists made up by contributions from the subscribers, but is to enforce the *several* contractual obligations of the subscribers to pay pro rata the losses of an insurance exchange.

The distinction is well illustrated by the case of *Hansberry vs. Lee*, 311 U. S. 32, 85 L. Ed. 22. In that case various purchasers of lots had accepted deeds containing restrictions against the sale of lots to members of the colored race. Some of the owners in the Addition brought suit against other lot owners individually and as representatives of all others in the Addition, seeking to cancel the restrictions as against all owners of lots in the Addition. The judgment held that the restrictions were no longer enforceable.

An action was later brought to enjoin the breach of the restrictive conditions by the owners of property in the Addition. To this suit the defense was

pleaded that the prior decision adjudicating the invalidity of the restrictions was res adjudicata. The Supreme Court held that the property owners who were not actual parties to, nor participants in the prior proceedings were not bound by the judgment. The Court stated:

> "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment (1) *where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties.* Plumb v. Goodnow (Plumb v. Crane, 123 U. S. 560, 31 L. Ed. 268, 8 S. Ct. 216; Confectioners' Machinery & Mfg. Co. vs. Racine Engine & Machinery Co. (CC) F. 914 (CCA 7th) 170 F. 1021; Bryant Electrict Co. v. Marshall (CC) 169 F. 426, or (2) *Where the interest of the members of the class, some of whom are present as parties, is joint, or* (3) *where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.* Smith v. Swormstedt, 16 How, U. S. 288, 14 L. Ed. 942, Supra; cf. Christopher v. Brusselback, supra, (302 U. S. 503, 504, 82 L. Ed. 390, 391, 58 Ct. 350), and cases cited.
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> "*The restrictive agreement did not purport to create a joint obligation or liability. If valid and effective its promises were the several obligations of the signers and those claiming under them.* The promises ran severally to every other

signer. It is plain that in such circumstances all those alleged to be bound by the agreement would not constitute a single class in any litigation brought to enforce it.

The Supreme Court of the United States has had the precise question before it in the series of cases involving the liquidation of Federal Joint Stock Land Banks.

The liability of the shareholders of such banks is *several and not joint* under Section 16, Fed. Farm Loan Act, Chap. 245, 39 Stat. at L. 374; 12 U.S.C.A. par. 812, in which the shareholders are declared to be

> "Individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof in addition to the amount paid in and represented by their shares."

Following the decision of the Supreme Court in *Wheeler vs. Green*, 280 U. S. 49, holding that the Federal Farm Loan Board had no authority to levy an assessment, and that the only means of enforcing the liability was by an adversary suit in equity by the creditors, many cases were brought in the lower Federal Courts by creditors against the stockholders of various insolvent joint stock land banks.

In the case of *Christopher vs. Brusselback, Supra*, a case almost identical with the case at bar, the

creditors of the Bank brought a class action in Illinois against all the shareholders of the Bank, and obtained a judgment fixing an assessment against all the shareholders for their proportionate share of the indebtedness. Suit was then brought on the Illinois judgment in the Federal Court in Ohio against the shareholders of the Bank to collect the amount of the assessment. The Circuit Court of Appeals held that the judgment in the class action in Illinois was binding on all members of the class regardless of whether they were actually before the Court in the class action. *Brusselback vs. Arnovitz*, 87 Fed. 2d 2761.

When the case reached this Court the judgment was reversed and the Illinois adjudication in the alleged class action was held invalid.

After reviewing the provisions of the applicable Statute fixing the stockholder's liability the Court stated:

> "The obligation which the statute imposes upon the stockholders is personal, and petitioners can be held to respond to it only by a suit maintained in a court having jurisdiction to render a judgment against them in personam. As the liability of the stockholders is to pay the debts of the bank to creditors "equally and ratably" judicial determination of the inability of the bank to pay its debts and the amount to be assessed against the stockholders to meet the deficiency are prerequisites to the enforcement of liability, and are essential parts of the only

cause of action which the statute gives to the creditors. It is plain that in such a suit the existence and extent of insolvency are facts, the allegation and proof of which cannot be dispensed with as to any stockholder unless, as between the parties to the suit they are matters already adjudicated.

"The statutes have fixed only the conditions on which liability of the shareholders is to attach, leaving to creditors as their only recourse the usual procedure of courts as the means of asserting the liability. There is nothing in the statute relating to the organiaztion of Federal Land Banks and the imposition of the stockholders' liability to suggest that by virtue of their membership in the corporation the stockholders can be said to have subjected themselves to a procedure for determining in their absence the essential conditions of liability, or to have relinquished their right to contest, as in any other litigation, every step essential to its establishment. As we cannot say that petitioners' membership in the bank was conditioned upon their surrender of the benefits of a procedure which would otherwise be required, there is no basis for a court to dispense with it more than in other cases in which a personal judgment is sought.

"In the circumstances the decree in the Illinois suit was not res adjudicata as to petitioners in any respect."

Following the decision of the Supreme Court in *Christopher vs. Brusselback, supra*, litigation arose out of the liquidation of the St. Louis Joint Stock

Land Bank. Partridge in behalf of all creditors brought suit against eleven of the principal stockholders of the bank individually and as class representatives of all other shareholders. Later a separate suit was filed by Ball in behalf of all creditors against all of the named defendants in the Partridge suit and one hundred sixty-nine others who were sued individually and as representatives of a class, to-wit, all stockholders of the Bank. The defendants in the Ball suit filed a motion to dismiss on the ground that the scope of the Partridge action was identical with the suit against them, and that the jurisdiction of the Court had been first invoked in that suit. This motion was first granted and then set aside by the trial court on the ground that since each suit was an action in personam, and the judgment of recovery would be binding only on persons sued and served, the prosecution of the two suits therefore would not be inconsistent.

The Circuit Court of Appeals for the Eighth Circuit in *Partridge vs. Martin*, 102 Fed. 2d 284, affirmed the action of the trial court saying:

> "Certainly as to the shareholders living in other states no adjudication could have been obtained in this case which would be binding upon them. Christopher vs. Brusselback, 203 U. S. 500, 82 L. Ed. 388, 58 Sup. Court 350; Holmberg vs. Carr, 8 Fed 2d 727. It is equally clear that no adjudication could have been obtained herein prior to the institution of the Ball suit which would have been binding upon the great body of shareholders resident in Mis-

souri, but not served with summons under the bill of complaint herein. Christopher vs. Brusselback, supra."

Application for certiorari was denied. 307 U. S. 644, 84 L. Ed. 1525, 59 Sup. Court 1042.

This Court in its decisions states the rule to be that the existence under a Statute or contract of an additional several liability of shareholders or subscribers for the debts of the Association does not deprive them of their day in Court to resist the imposition of an assessment *unless some procedure or mechanism has been set up by Statute or contract* under which the corporation or association may be brought into Court for the determination of insolvency and the amount of an assessment, so that the subscribers may be deemed to have consented to such an ex parte determination by virtue of having accepted membership in the Association.

The converse of the principle laid down in *Christopher vs. Brusselback* is established by the holding in *Pink vs. AAA Highway Express*, 314 U. S. 201, 86 L. Ed. 152, 62 Sup. Court 241. The Court there decided that the New York Statute which provided that any mutual insurance company shall specify the extent of the contingent liability of members for losses, and that all assessments whether levied by the Board of Directors, by the Superintendent of Insurance, in the liquidation of the corporation or otherwise, shall be for no greater amount than that specified, *provided the mechanism for an assesment* and that the members of the mutual by be-

coming such, had consented to the imposition of an assessment in such manner, and that the judgment in a class suit, to which a member was a party by representation only, establishing the necessity for and amount of the assessment was binding upon him.

The late Chief Justice was the author of the opinions in Christopher vs. Brusselback, supra and Pink vs. AAA Highway Express, supra, and the two cases taken together illustrate clearly the conditions under which the subscribers at a mutual or reciprocal insurance exchange may be bound by the judment although not parties to the suit.[1]

In the case now before the Court the applicable Texas Statutes impose no contingent liability on the subscribers, and of course, provide no mechanism for determining the necessity for and amount of any assessment. The power of attorney of each subscriber is the only contract involved. Assuming that under it, the subscriber became liable for an additional annual premium if the losses of the exchange were such as to require it, there is no procedure provided in the contract for the levy of an assessment. These petitioners therefore, by accepting membership in the exchange, did not consent to an ex parte determination of their liability in a suit to which they were not parties and of which they had no knowledge.

It has been demonstrated that the powers of at-

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[1]Miller vs. Barnwell Bros., 137 Fed. 2d 257.

torneys sued on in the alleged class action provided that the subscribers were bound *severally* and not jointly. The judgment prayed for was a *several* and not a joint judgment, and the judgment actually rendered was *"several as to each subscriber * * * and not joint."*

The purpose of the suit was to impose a personal liability on the absent subscribers for the debts of the exchange. It was therefore an action in personam. Jurisdiction over the person of the absent members of the class was essential to the validity of the judgment. We submit that the judgment against these petitioners who were not named as defendants in the suit, and had no notice thereof, and who did not participate therein, is contrary to the requirements of the due process clause of the Federal Constitution.

The judgment of the Supreme Court of Texas that petitioners are bound by the prior adjudication in Cause No. 63621, and that petitioners must pay the assessment based on that judgment should be reversed.

POINT THREE

(Restated)

The Supreme Court of Texas erred in holding that the judgment in the class suit was binding on the absent and uncited subscribers in view of the uncontroverted proof of the Receiver's conduct in tampering with and in covertly negotiating settlement agree-

ments with the named defendants so as to thwart any real assertion of a defense in behalf of the absent members of the class.

ARGUMENT

In *Smith vs. Swormstedt*, 16 How 288, 14 L. Ed. 948, it is stated:

> "In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, *so that it may be fully and honestly tried.*"

In *Hansberry vs. Lee*, 311, U. S. 32, this Court stated that State Courts may attach descriptive labels to litigations before them as they may choose, and may attribute to them such consequences as they may think appropriate, subject only to the requirements of the Constitution of the United States. In this connection the Court held

> "But when the judgment of a state court ascribing to the judgment of another court, the binding force and effect of res judicata is challenged for want of due process, *it becomes the duty of this Court to examine the course of procedure in both litigations*, to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes."

In discussing class suits in general, and the equit-

able considerations which justify the use of the class suit, in certain situations, the Court further held that

> " * * * * * where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the Court will proceed to a decree * * * * * "
>
> "* * * This Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it."

From the foregoing decisions by this Court it follows that the very basis for the exception involved in the class suit device is the assumption that the parties of record by reason of self-interest, will fully and fairly present the issues involved, and by so doing insure a full and complete trial for themselves and for the absent members of the class. As a requisite to the validity of the proceeding it must appear that the procedure actually followed was such as to insure the protection of interest of absent parties.[1]

In *Campbell vs. T. & P. Ry. Co.* 4 F. cas. 2366, 1 Woods 368, it was held that any deviation from the requirement of utmost fairness and good faith, would

[1]Freeman on Judgments, 5th Ed. par. 435, 436. 2 Black on Judgments, 2nd Ed. par. 545. 30 Am. Jur. 963, Judgments, par. 227. Ussery vs. Darrow, 188 So. 885; Mennig vs. Groves, 234 N. W. 189; Los Angeles Co. vs. Winans, 109 Pac. 640.

be a proper ground for setting aside the judgment at the instance of an omitted party.

In 21 C. J. 285, the rule is thus stated:

> "Where parties, any one of whom would have a right to come in by petition and be made a party, if necessary to protect his interest, are allowed to be dispensed with on account of their number, *the parties of record ought to proceed with the utmost fairness and good faith, and should not resort to anything like sharp practice in procuring a final decree which is to be binding on all.*"

With the rule established by the foregoing authorities in mind, we call the Court's attention to the following uncontradicted testimony: The receiver, Keith Kelly testified that he had deliberately omitted to make Sid W. Richardson, Richardson Oils, Inc., Houston Transportation Co., and other petitioners who had filed pleadings in the first suit (Kelly Receiver vs. Sid W. Richardson, et al — No. 61778), party defendants to the class suit in cause No. 63621. (R. 266). With reference to the actual selection of the representative defendants Kelly testified, "I don't know what went on in my mind at the time I selected the defendants to represent the class." (R. 267).

Kelly testified that he had made settlement with T. B. Hill on April 22, 1941, after having discussed the matter and possibility of settlement with Hill's attorney on several occasions prior to the time the cause came on to be tried and thereafter; that the exact date upon which the agreement was reached was unknown but that it was several days prior to

the time it was actually consummated, Kelly testified further that Mr. Carlisle Cravens, of the firm of Cantey, Hanger, McMahon, McKnight & Johnson, of Fort Worth, represented four named defendants, H. E. Cannon, B. C. Bates, Livestock Commission Company and J. M. Garrett. That he had had many discussions with Mr. Cravens concerning his clients' purported liability, both before and after the trial and before the judgment became final, and that Mr. Cravens had told Kelly that he did not think he would be at the trial. (He did not appear at the trial). The testimony further established that Kelly had corresponded with the attorney for Morris Catchman after the suit was filed but before the trial, and that Catchman had tendered the amount of his assessment into the registry of the court. That the same thing was true as to C. W. Lott and Lockhart Produce Company, Inc. Kelly further testified that he had discussed the possibility of settling the Foxworth-Galbraith Lumber Company claim; that he had had some correspondence and had talked to Judge Guy Rogers, of Wichita Falls, on the telephone concerning the matter prior to the time the judgment became final, but that the final settlement was made with his client on or about April 17, 1941. Kelly further testified that the matter of the O. K. Warehouse Company liability was discussed with the attorney for that company prior to the time suit came on for trial, and that the amount claimed was tendered into court and that they made no further appearance in the case; that the same thing occurred with reference to the claim against the Oakhurst

Land Company, represented by Todd, Crowley & Thompson of Fort Worth, and that he had discussed the matter of the claim with said attorneys after said suit was filed and before the time of trial, and had told them that the most he could recover against them was the amount of their assessment, which was $119.48. The Rogelein Packing Company, at San Antonio, was represented by Terrell, Davis, Hall & Clemmons of San Antonio, and the testimony was that prior to the time the case came on for trial, settlement of their claim in the amount of $436.26 had been discussed; that they did not appear in the trial, and that on April 23, 1941, the claim was settled for fifty per cent of its amount. Kelly further testified that the Riddle Oil Company, whose potential liability was $801.77, and which company appeared at the trial of the case by its counsel, and who gave notice of appeal from said judgment, was settled with for $200.00 on April 22, 1941, but that he had discussed the matter of settlement with Willis Gresham, the attorney for said company, prior to the time the case came on for trial. That notice of appeal from the judgment was given by T. B. Hill, Harry Joseph and Riddle Oil Company, and that settlements were made with Hill and Riddle Oil Company, leaving the defendant, Joseph, as the only one entitled to appeal, and that Joseph's entire liability was $18.00 (R. 253-260 Kelly testified that he named 29 defendants in Cause No. 63621, and that there were approximately 3200 subscribers at the National Indemnity Underwriters. (R. 243).

Judge Guy Rogers of Wichita Falls testified that

he was a lawyer; that he resided in Wichita Falls; that his firm was Rogers & Montgomery; that he had been a County Judge and District Judge; that he represented Foxworth-Galbraith Lumber Company, one of the named defendants in Cause No. 63621; that the Lumber Company was served with process and it was delivered to his firm for legal defenses; that he had filed pleadings in cause No. 63621, it being his recollection that he filed a plea of privilege; that after he filed the plea of privilege, and after the case was set for trial, Kelly came to Wichita Falls and saw him; that Kelly walked into his office and said: " '*You have caused me a lot of trouble about this thing*', and said that he '*thought we represented a client whose interest was so small that he would not contest it*'; *that he had not been sued for enough to justify his client for defending it, and 'what you doing this for'*." That he told Kelly that his firm had represented Foxworth-Galbraith through the years, and that they were simply taking care of their interests; that he mentioned settling the case with him and disposing of it without his having to defend it, and without his going to Austin and participating in the suit; *that it was agreed that he would not go to Austin and defend against the controverting plea, and that in time a release would be executed whereby for a given sum of money, Foxworth-Galbraith would be absolved*, and that the amount of money was too small to justify his going ahead with the defense of the suit; that up to that time he had intended to present a defense; *that as a result of the conference with Kelly,*

a settlement was agreed upon; that he agreed he would no longer press or urge the plea of privilege; that nothing further was done by way of defense—that Kelly carried out his promise and the suit against Foxworth-Galbraith was afterwards settled—that Kelly lived up to his promise, and that they settled for the identical amount agreed upon; that the conversation and agreement he had with Kelly before the judgment was taken in Cause No. 63621; that he did not go to Austin on the date of February 21, 1941, and that he made no other defense on behalf of Foxworth-Galbraith after making the agreement with Kelly; that when Kelly approached the settlement, Kelly said: "Well, I'll beat you down there"; and Kelly said: "You've got me all messed up"; and Kelly said: "The reason I settled it with you". (R. 299-304).

The witness, S. B. Holloway, testified that he was a lawyer associated with the firm of Thompson and Barwise, of Fort Worth; that he represented the Brownwood Public Service Company in cause No. 63621; that his client was served with process; that he filed formal answer, on October 3, 1940; that after he filed the formal answer and prior to February 21, 1941, when the case came on for trial, he had several conversations with Kelly; that he attempted to keep up with the case, having in mind that if necessary he would go to Austin and fight the suit; that at Kelly's office, Kelly mentioned the possibility of a settlement; that later he got notice that the case was set for trial for February 14, 1941, and it was postponed to the following week; *that prior to the*

date of February 14th, he had an understanding with Kelly; that he told Kelly he was going down there and appear on behalf of his client unless he had some understanding about it; and Kelly said: "Well, I will tell you what I will do; *I will tell you now, I will give you at least a one-third discount on the amount claimed*"; that he told Kelly: "If we have that understanding that you will settle with me on that basis, give me a letter to that effect, and I will dismiss it from my mind, and you can go about your business and try your case and do whatever you want to do in the matter as far as I am concerned, if I am assured you will settle with me by accepting a definite percentage of the claim".; that pursuant to this conversation, *Kelly wrote him a letter stating in substance that it would serve as assurance that if and as he obtained a judgment in the case, he would make a separate settlement with Brownwood Public Service Company at a certain stated percentage fixed in that letter;* that this occurred prior to February 14, 1941; that he insisted upon having the letter before the trial; that after the judgment was finally taken, he did settle; that the settlement was consummated on January 6, 1942; that he paid Kelly $50.00; that his client sent him a check for $78.25 in settlement of the claim; that in the meantime, he learned that several subscribers whose liability was large, were preparing to file suit to set the judgment aside and he thought it well to await further developments, and that he also learned that Kelly was very much concerned over the contents of the letter he had written regarding the settlement, and Kelly was

afraid the letter would be embarrassing to him in his controversy with the other defendants; that having this situation in mind, instead of offering Kelly the amount of $78.25, that he offered him $50.00 and the return of his letter, and that Kelly accepted his proposition; that *Kelly had told him that he wanted to get that letter back; that his language was in effect that he had stuck his neck out, and was out on a limb, and that he wanted to get possession of the letter*, and he told Kelly that if and when he settled his client's liability, that he would return the letter to him, and that when he made the settlement, he would return the letter to Kelly, that he returned the letter and Kelly carried it away with him (R. 311-317

Captain O. Shelley Evans testified: That he was presently a Captain in the U. S. Army; that prior to going into the Army, he was a lawyer, and resided at San Antonio, Texas; that he represented W. H. Balzen, one of the named lefendants in cause No. 63621; that he was acquainted with Kelly; that he was present in the 98th District Court of Travis County, Texas, on February 21, 1941, at the trial of Cause No. 63621; that none of his clients were personally present; that there were two other attorneys representing subscribers present at the trial; that none of the subscribers were present; that no person was present except the attorneys, the judge, the court reporter, and an auditor or bookkeeper; that he conferred with Kelly prior to the time that cause No. 63621 came on for trial; that he and Kelly had a conversation in the courthouse in the morn-

ing; that the court stated the case would be tried at 2:30 p. m., and that he and Kelly went to the cafe across the street from the courthouse; that while in the cafe, he and Kelly discussed the merits and the course of action open to his clients; that Kelly tried to convince him that an assessment was just and proper, and that since he had been connected with the claim department of the National Underwriters, that I should favor an assessment; that he stated to Kelly that he represented Krisch & Lanham, R. C. Crawford, W. R. Trailkill and W. H. Balzen, and that his interest in the law suit was to successfully defend for the clients who had employed him; that he told Kelly that he had prepared an adequate defense for his clients, and thought that he ought to prevail; that after some discussion of the law, Kelly stated: *"that if I hadn't come up here, he would have a cinch to win his lawsuit."* That he, Evans, suggested to Kelly that if his appearence might cramp his style, he could dismiss the suit against his clients; that Kelly then stated that he had no authority to dismiss any parties, but that he could make some sort of arrangement not to enforce payment from Evans' clients; *that Kelly then agreed with him as attorney for his several clients that if he did not press his defense, he would not make any further attempt to enforce collection of any assessment against his clients.* That in other words, Kelly agreed to "release my clients from any further obligation to pay additional premiums or assessments if I wouldn't bear down on the presentation of my defenses." That they then

discussed how this sort of agreement could be worked successfully; that it was then agreed that if Kelly was awarded a judgment in his class suit, that a judgment would be taken against Evans' clients, but that no effort would be made to enforce a collection from such clients in any manner, nor would Kelly later file a suit to enforce collection against them; that the trial consumed about two and a half or three hours; that he then communicated the fact of the trade to his clients; that after March 8, 1941, Kelly did not make any demand of the payment of the assessment liability established by the judgment in cause No. 63621; that after April 8, 1941, one of his clients received a notice from Kelly asking that a remittance be made, and he brought this notice to him and he wrote Kelly a letter calling his attention to the agreement, and thereafter the client received no further notices; that he personally had claim against the National Indemnity Underwriters; that it was for salary and traveling expense in the sum of approximately $400.00; that he represented four clients, having satisfactorily effected a compromise settlement in their behalf; he had no further interest in the outcome of the lawsuit against the other defendants. (R. 284-290

The witness, Willis Gresham, testified that he was an attorney, and that he represented Riddle Oil Company, Harry Joseph and T. B. Hill; he attended the trial of that suit; that he settled the claim of Riddle Oil Company and the claim against T. B. Hill; that prior to the trial, he tried to dis-

cuss settlement with Keith Kelly; that the Harry Joseph claim was still pending; that he did not introduce any evidence at the trial of the case; that his three defendants were all domiciled in Travis County; that Kelly discussed the fact with him if he settled in advance of the trial, he could not hold venue in Travis County; that Kelly told him "I am not going to settle with you because, among other reasons, I want venue to remain in Travis County, and I am going to attempt to hold it here, and if I settle with you, then I might not be in such good position as I otherwise would."; that he subsequently settled by paying Kelly two-thirds of the Hill claim, and about one-fourth of the Riddle Oil Company claim. (R. 383-388).

The foregoing is sufficient to disclose the manipulations that took place.

We assert that the Receiver, with design, stifled the defense in the class suit. He had instituted an original suit against 193 defendants, naming as defendants Sid W. Richardson, Richardson Oils, and Houston Transportation Company, petitioners herein, each of whom have assumed a large and responsible burden in the instant case. When these named defendants, together with others, began to assert a vigorous defense to this suit, the Receiver dismissed it. Months after, he filed Cause No. 63621. He deliberately omitted to sue petitioners who had contested his first suit and named in this cause only twenty-eight defendants as representatives of the 3200 subscribers. Of the twenty-eight

selected, only one had a purported liability in excess of $500.00. Ostensibly, these named defendants were supposed to represent absent members of the class, whose liabilities exceeded Four Hundred Thousand ($400,000.00) Dollars. Practically half of the named defendants made default. Of those remaining the Receiver conducted settlement negotiations with twelve. On the very day the cause was tried he reached an agreement with an attorney representing a named defendant and three interveners, that if he would not resist the suit that no writs of execution would ever be issued against his clients. In the ultimate analysis the Receiver so guided the proceedings that only one man, Harry Joseph, with an assessment liability of $18.00 remained to present a defense and perfect an appeal.

We assert to the Court that the Receiver in conducting settlement negotiations with a single one of these so-called representative defendants, was guilty of misconduct which prevented a full and fair defense of this case, and which brings it within the condemnation of the Supreme Court of the United States. In all events, when the day of the trial came and the Receiver reached an agreement with one named defendant, and the three intervening defendants, that if they would not resist the procurement of the class judgment, that he would refrain from getting out an execution against them, surely it cannot be said that such procedure fairly insured the protection of the interest of the absent parties who are now held to be bound by the judgment rendered.

The method adopted by the Receiver violates every principle of class suits. He selected the named representatives. We do not believe that he could have a valid class suit where he deliberately selects those whose interests are so small that they cannot afford to defend. In that sort of a situation they cannot be depended on to bring forward the merits of the controversy. But even if we are wrong in that assertion we are sure that he cannot tamper with those named defendants; we submit he cannot offer settlement to a single one. If so, he can settle with all, and thus destroy the class. Surely he cannot offer settlements to all who evidence a purpose to make a defense as was done in this case, and have a valid class suit.

The Supreme Court of Texas in its majority opinion, has referred to the recitation appearing in the original class judgment to the effect that the 3200 absent members of the class were "fairly and truly represented herein by the named defendants." This bare recitation in the judgment is held in the majority opinion to be conclusive that the conduct of the Receiver effected no vice in the class judgment. The dissenting opinion, after detailing the uncontroverted testimony, holds that those of the defendants who remained in the case after all the manipulations of the Receiver, did not fairly represent the interest of the absent members of the class, and that the judgment thus secured was void.

This Court in the *U. S. of America vs. Dick Johnson*, 319 U. S. 302, held:

"That interest has been adjudicated in a proceeding in which the plaintiff has had no active participation, over which he has exercised no control, and the expense of which he has not borne. He has been only nominally represented by counsel who was selected by appellee's counsel and whom he has never seen. Such a suit is collusive because it is not in any real sense adversary. It does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated — a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court. Chicago & G. T. R. Co. vs. Wellman, 143 US 339, 36 L. Ed. 176, 179, 12 S Ct 400; and see Lord vs. Veazie, 8 How (US) 251, 12 L ed 1067; Cleveland vs. Chamberlin, 1 Black (US) 419, 17 L ed 93; Bartemeyer v. Iowa, 18 Wall. (US) 129, 134, 135, 21 L ed 929, 931; Atherton Mills vs. Johnson, 259 US 13, 15, 66 L ed. 814, 815, 42 S Ct 422. Whenever in the court of litigation such a defect in the proceedings is brought to the court's attention, it may set aside any adjudication thus procured and dismiss the cause without entering judgment on the merits. It is the court's duty to do so where, as here, the public interest has been placed at hazard by the amenities of parties to a suit conducted under the domination of only one of them."

The adversary proceeding, the "honest and antagonistic assertion of rights" in behalf of absent members of the class is the very thing guaranteed by the constitution. There has been no adversary proceeding, there has been no honest and antagon-

istic assertion of any rights whatsoever in behalf of these petitioners in the prior litigation. The petitioners have never had their day in court. They have been deliberately deprived of their right to be heard and the judgment of the state court holding these petitioners bound by a judgment ignoring these constitutional requirements is basically unsound.

All the petitioners ask is that they be permitted, in a fair and openly conducted trial, to have their day in Court where they may openly contest and litigate every step essential to the establishment of liability against them, and where the burden of proof will be cast on the Receiver to prove up his case rather than on the Petitioners to disprove it as has been their burden on this Bill of Review.

Petitioners have demonstrated the invalidity of the class suit judgment in cause No. 63621. The judgment on the cross-action against these petitioners for the amount of their respective assessments is premised on the validity and binding effect of the class suit judgment. It follows, the class suit judgment being void, that the judgment on the cross-action is erroneous.

CONCLUSION

We respectfully submit that the decision of this Court in *Christopher vs. Brusselback*, *supra*, is decisive of the question presented in the first two points of this brief. The class suit device is not available in a suit to impose a several liability

against great numbers of absent persons who are to be bound by the judgment.

But even if the class suit was maintainable as such, there is something fundamentally wrong in the judgment of a state court which will allow the proponent of a class suit to conduct the litigation as the uncontroverted record in this case discloses the case to have been conducted.

It is such a judgment that we ask this Court to review.

Petitioners respectfully pray that this Honorable Court exercise its jurisdiction to grant a writ of certiorari to review the judgment of the Supreme Court of Texas, and for such other orders and relief as may be appropriate.

Respectfully submitted:
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APPENDIX

TITLE 78

CHAPTER TWENTY

Indemnity Contracts

Art. 5024. May Exchange Contracts

Individuals, partnerships and corporations of this State hereby designated subscribers are hereby authorized to exchange reciprocal or inter-insurance contracts with each other, or with individuals, partnerships and corporations of other States and countries, providing indemnity among themselves from any loss which may be insured against under other provisions of the law, excepting life insurance. (Acts 1915, p. 269).

Art. 5025. Attorney for Subscribers

Such contracts may be executed by a duly appointed attorney in fact, duly authorized and acting for such subscribers. The office or offices of such attorney may be maintained at such place or places as may be designated by the subscribers in the power of attorney.

Art. 5026. Declaration of Subscribers

Such subscribers, so contracting among themselves, shall, through their attorneys, file with the Commissioner a declaration verified by the oath of such attorney setting forth:

1. The name or the title of the office at which

subscribers propose to exchange such indemnity contracts. Said name or title shall not be so similar to any other name or title previously adopted by a similar organization, or by any insurance corporation or association, as in the opinion of such Commissioner is calculated to confuse or deceive. The office or offices through which such indemnity contracts shall be exchanged shall be classified as reciprocal or inter-insurance exchanges.

2. The kind or kinds of insurance to be effected or exchanged.

3. A copy of the form of policy, contract or agreement under or by which such insurance is to be effected or exchanged.

4. A copy of the form of power of attorney or authority of such attorney under which such insurance is to be effected or exchanged.

5. The location of the office or offices from which such contracts or agreements are to be issued.

6. That applications have been made for indemnity upon at least seventy-five separate risks, aggregating not less than one-half million dollars as represented by executed contracts or bona fide applications to become concurrently effective, or in case of liability or compensation insurance, covering a total payroll of not less than two thousand employes.

7. That there is on deposit with some State or National Bank as a depository for the payment or

losses not less than the sum of ten thousand dollars. (Id.)

Art. 5027. Service of Process

Concurrently with the filing of such declaration, the attorney shall file with the Commissioner of Insurance an instrument in writing, executed by him for said subscribers, conditioned that, upon the issuance of certificates of authority hereinafter provided for, service of process may be had upon such Commissioner in all suits for this State arising out of such policies, contracts or agreements, which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or inter-insurance contracts through such attorney. Three copies of such process shall be served, and the Commissioner shall file one copy, forward one copy to said attorney, and return one copy with his admission of service. (Id.)

Art. 5028. Statement of Indemnity

Such attorney shall file with the Commissioner a statement under the oath of such attorney showing the maximum amount of indemnity upon any single risk, and such attorney shall, whenever and as often as the same shall be required, file with such Commissioner a statement cerified by his oath to the effect that he has examined the commercial rating of such subscribers as shown by the reference book of a commercial agency having at least one hundred thousand subscribers, and that from such examination or from other information in his possession it appears that no subscriber has assumed on any single risk an amount

greater than ten per cent of the net worth of such subscriber. (Id.)

Art. 5029. Reserve

There shall at all times be maintained as a reserve a sum in cash or convertible securities equal to one-half of the aggregate net annual deposits collected and credited to the accounts of the subscribers on policies having one year or less to run and pro rata on those for longer periods. For the purpose of said reserve, net annual deposits shall mean the advance payments of subscribers after deducting therefrom the amounts specifically provided in the subscribers' agreements for expenses and reinsurance. Said sum shall at no time be less than ten thousand dollars, and if at any time one-half of the aggregate deposits so collected and credited shall not equal that amount, then the subscribers, or their attorney for them, shall make up any deficiency. (Il.)

Art. 5030. Financial Report

Such attorney shall make an annual report to the Commissioner for each calendar year, which report shall be made on or before March 1st, for the previous calender year ending December 31, showing the financial condition of affairs at the office where such contracts are issued is in accordance with the standard of solvency provided for herein, and shall furnish such additional information and reports as may be required to show the total premiums or deposits collected, the total losses paid, the total amounts returned to subscribers, and the amount retained for

expenses. Such attorney shall not be required to furnish the name and address of any subscriber. The business affairs and assets of said reciprocal or inter-insurance exchanges, as shown at the office of the attorney thereof, shall be subject to examination by such Commissioner. (Id.)

Art. 5031. Any Corporation May Exchange

Any corporation now or hereafter organized under the laws of this State shall, in addition to the rights, powers and franchises specified in its articles of incorporation, have full power and authority to exchange insurance contracts of the kind and character herein mentioned. The right to exchange such contracts is hereby declared to be incidental to the purposes for which such corporations are organized and as much granted as the rights and powers expressly conferred. (Id.)

Art. 5032. Certificate of Authority

Each attorney by whom or through whom are issued any policies of or contracts for indemnity of the character referred to herein shall procure from the Commissioner annually a certificate of authority stating that all of the requirements have been complied with and, upon such compliance and the payment of the fees required by this law, the Commissioner shall issue such certificate of authority. Such Commissioner may revoke or suspend any certificate of authority issued hereunder in case of breach of any condition imposed by this law after reasonable written notice has been given said attorney so that he may appear

and show cause why action should not be taken. Any attorney who may have procured a certificate of authority hereunder shall renew same annually thereafter. Any certificate of authority shall continue in effect until the new certificate of authority be issued or specifically refused. Such attorney shall pay a fee for the issuance of the certificate of authority herein provided or the sum of twenty dollars, which shall be in lieu of all license fees and taxes of whatsoever character in this State. (Id.)

Art. 5033. When Insurance Law Applies

Except as herein provided, no insurance law of this State shall apply to the exchange of such indemnity contracts unless they are specifically mentioned. (Id.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 288

SID W. RICHARDSON, ET AL

Petitioners,

VS.

KEITH KELLY, RECEIVER,

Respondent.

Reply to Respondent's Brief in Opposition to the Petition for Writ of Certiorari

---

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Respondent's reply to the petition for writ of certiorari raises in limine the absence of any real Federal question for this Court's determination. The argument in this connection inaccurately states the Petitioner's contentions, misconstrues the decision of the Supreme Court of Texas in the case at bar and on the whole is misleading to such extent as to require reply on our part.

We respectfully request the court to permit this reply for fear that silence on our part would be taken as an endorsement of the statements made and conclusions reached in respondents' argument.

PRELIMINARY STATEMENT

Respondent precedes the argument of his counterpoints by a "Statement of the Case," in which he asserts that the judgment in the assessment suit, Cause No. 63621, was *in rem* and not *in personam;* that such judgment contains recitals as to the court's jurisdiction; that under state law such a judgment is conclusive until set aside on direct attack; that in such an attack it is incumbent to establish the existence of a meritorious defense; and that the Courts of Texas have held in the case at bar that petitioners have no defense.

In the first place this court has held that suits such as the one at bar are *in personam* and not *in rem.* The Texas cases *(Clay v. Moore,* 175 S. W. (2d) 433 and *McLean v. Morrow,* 137 S. W. (2d) 113) cited by respondent at page 3 in support of his statement that the suit is *in rem,* do not so hold and if they did the holding would conflict with this court's holding in *Christopher v. Brusselback,* 302 U. S. 500. See also *Partridge v. Martin,* 102 F. (2d) 284, *Cert. Den.* 307 U. S. 644.

Secondly the pronouncement that the courts' recital as to its jurisdiction in the judgment in Cause 63621 is conclusive and can be avoided only by a di

rect attack in which a meritorious defense is proved is a broadside proposition that begs the question actually at issue and depends for validity on an erroneous premise—viz: that the recitals in the judgment concerning the class defendents are conclusive regardless of the constitutionality of the use in such a case of the class action device.

The judgment in 63621 recites that jurisdiction existed over the petitioners and other uncited subscribers *because they were members of a class.* If the class suit was not maintainable as such, then the judgment is void on its face and subject to attack anywhere at anytime without the necessity of showing the existence of a defense thereto. The law of Texas on this point *(Empire Gas & Fuel Co. v. Noble,* Tex. Comm. App., 36 S. W. (2d) 451, 454; *Kern Boche Supply Co. v. Freeze,* 96 TEX 516; *Galveston H. S. & A. Ry. v. War,* 74 TEX 47) does not differ from the rule applied by this court. *Old Wayne Mutual Life Association v. McDonough,* 204 U. S. 8; *Earle v. McVeigh,* 1 Otto (91 U. S.) 503.

The assertion at page 7 of respondent's brief, emphasized by the use of italics, that "petitioners have never contended at any point in this proceeding that the judgment entered in the class suit is void on its face and that they are entitled to set it aside without showing a meritorious defense" is completely refuted by the record.

The petitioners have contended at every step of the case that the judgment in 63621 if held binding upon

them as members of a class deprived them of their property without due proccess.[1]

The Supreme Court of Texas in deciding the case stated (R. 806):

> "Petitioners urge that the judgment in Cause 63621 is void because that suit was not maintainable as a class suit."

Next, Respondent at page 9, repeated at pages 13, 17 and 44, of his brief states categorically that the court below held that petitioners had no defense to the cause of action asserted in cause 63621. This is the keystone in respondents argument—that the case turned on a decision that petitioners had no defense and therefore the decision of the Texas Court is based on an adequate non-federal ground precluding this court's review of the case.

The statement is subject to a fundamental objection. In the Supreme Court of Texas, petitioners urged that the judgment was void (R. 806) or in any event was voidable because of the Receiver's conduct of the litigation. In the event it was held voidable, petitioners urged that they had a defense to the assessment suit. The Supreme Court expressly refused to pass on the question of the defense urged, basing its opinion entirely on the holding that the original

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[1]Petitioner's Second Amended Original Petition, par. 26 (R. 172) Second Point of Appeal in Court of Civil Appeals (R. 751) Fifth Assignment of Error in the Application for Writ of Error to the Supreme Court of Texas (R. 798).

judgment was neither void, nor voidable because of the Receiver's actions.

The opinion of the Texas Supreme Court, in this respect at least, is clear and express. This Court is not constrained to accept either petitioners' or respondents' explanation as to its content. The holding of the Court itself is as follows (R. 816):

> "We hold that the judgment in Cause 63621 was neither void nor voidable, *therefore, it is unnecessary for us to consider other questions raised by petitioners.*"

REPLY TO RESPONDENT'S FIRST, SECOND AND THIRD POINTS

Respondent asserts in Points One and Two that a prerequisite to petitioners case was the establishment of a meritorious defense to the matter litigated in Cause 63621; that the Supreme Court of Texas in the case at bar has held that petitioners have no meritorious defense; that the judgment is, therefore, based on an adequate non-federal ground and beyond the jurisdiction of this Court to review.

Point Three goes one step further, asserting that petitioners do not even contend that they have a defense to the cause of action or that they could prevail in the suit if it should be retried.

The basic premises involved is not included in the propositions asserted but is made in respondent's "Statement of the Case" where it is stated that the

class suit judgment containing jurisdictional recitals concerning the petitioners as class members, is not void, but voidable at best, and that petitioners, therefore, were under the burden of establishing a meritorious defense to the suit before they could set the judgment aside. As pointed out (Page 3, ante) this assertion assumes the very question involved in this petition—the availability of the class action device in the first place. If the class device was not available, then the judgment against petitioners as members of a class was void on its face—a nullity—and the Supreme Court of Texas in refusing to so hold deprived petitioners of their property without due process of law, regardless of the basic validity of their defense to an assessment suit.

Secondly, the respondent asserts that the Supreme Court of Texas has held that petitioners have no defense to the cause of action asserted in the class suit. The premise is false. The Supreme Court deliberately refused to hold that no defense existed (R. 816) and based its holding squarely on the proposition that petitioners as class members were bound by the judgment in cause 63621 and that the judgment was neither void (because of the unconstitutional use of the class action device) nor voidable (because of the fraud of the Receiver in the conduct of the litigation).

Respondent then inaccurately states in Point Three, that these petitioners admit that they have no real defense to an assessment suit and that on a retrial of the case, the same judgment must be entered be-

cause of their inability to present a defense. (Reply Brief, Page 17).

The self-evident fact is that petitioners have devoted six years of litigation with its attendant expense to the proposition that they have a defense to an assessment suit. This case is before this Court on petition because the State Court has held that petitioners are concluded by the class judgment in cause 63621 and that the finality of that judgment bars petitioners from reopening the case to present their defense.

If Respondent intends to assert that there can be no defense to a class assessment suit in Texas, he has ignored the decision in *Hill v. Blanco National Bank*, 179 S. W. (2d) 999, Writ Refused. In the only case in Texas where the original class suit was actively defended by the class defendants and appealed to the higher courts, it was held that the members of the exchange, under the reciprocal insurance law of Texas and under their contracts were not liable for an assessment.

The basic validity of petitioners' defense was not considered nor determined by the judgment of the State Supreme Court (R. 816). It cannot be determined by this Court because it involves no federal question. It is a question to be determined upon a retrial of the case, if the Receiver determines to pursue his alleged right to the assessment.

REPLY TO RESPONDENT'S FOURTH POINT

The argument on this point asserts that a class action is properly maintainable to establish the several liabilities of the members of a reciprocal insurance exchange for an assessment.

This was the exact question determined by the decision of this Court in the Brusselback case (302 U. S. 500). In that case the statute imposed on the shareholders of the bank an additional and contingent liability, but the liability so imposed was *several.* To the extent that the identical liability existed as to each and every shareholder, the duty owed to the creditors of the bank by the shareholders was *common,* but the existence of this *common* obligation was insufficient to deprive such shareholder of the right to contest every step essential to the judicial determination of the asserted liability against them severally and as individuals.

The statement at page 21 of respondent's brief that the State Supreme Court has held in *Sergeant v. Goldsmith Dry Goods Co.,* 110 TEX 482, 221 S. W. 259, that the members of a reciprocal insurance exchange are *jointly* and *severally* liable for claims of third parties is inaccurate. The insurance company in the case cited by respondent was organized and the activities giving rise to the ltigaton involved, occurred prior to the enactment of the reciprocal insurance laws of Texas. In the case of *Hill v. Blanco National Bank,* 178 S. W. (2d) 999, Writ of Error Refused, it is held that the decision in *Sergeant v. Gold-*

smith Dry Goods Company does not apply to reciprocals organized as such under Title 78, Chapter 20, Revised Civil Statutes of Texas, and that no joint liability exists against the members of such an exchange for any class of claims. Even the Receiver in Cause 63621 did not go this far in his contention and the judgment procured by him was expressly made *several and not joint.* (R. 665).

Respondent in his brief has argued the propriety of the class assessment suit from the decisions of this Court in *Hartford Life Insurance Co. v. IbS*, 237 U. S., 662; *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356 and *Royal Arcanum v. Green*, 237 U. S. 531, none of which are in point as set out by Chief Justice Alexander in the dissenting opinion below.

The rule established by the Brusselback case and *Pink v. AAA Highway Express* is discussed at Page 28 of the Petition and supporting Brief. Briefly restated, the rule is that a class suit to determine the members' liability to assessment may bind absent and uncited members *only if because of statute or their contracts the members have consented to such ex parte determination by accepting membership in the association.*

The existence of a contingent liability is not enough. It is the existence of a statutory or contractual right to enforce that liability by *assessment* that is controlling. *Miller v. Barnwell Brothers*, 137 Fed. 2d 257.

The cases cited by the respondent to support the use of the class suit in this case do not conflict with the general rule. In fact, the cases support petitioner's contention because in each of them, the right to enforce the liability of the members or shareholders by *assessment* existed either by statutory enactment or by virtue of the provisions of the contracts involved. With the distinction in mind, we turn to an analysis of the cases cited.

For example, in the *IBS* case, the certificates of insurance involved provided for the "payment of all assessments duly levied upon all the members to create a mortuary fund."

In *Royal Arcanum v. Green*, supra, Green's application for membership contained an agreement "to make punctual payment of all dues and assessments for which I may become liable and to conform in all respects to the laws, rules and usages of the Order now in force or which may hereafter be adopted."

In *Cauble's* case, while it does not appear from the opinion of the Court, the fraternal insurance organization involved (Supreme Tribe of Ben Hur) undoubtedly had the customary assessment provisions in its by-laws common to such organizations.

In *Mitchell v. Pacific Greyhound Lines*, 91 Pacific (2d) 176, a case involving a reciprocal insurance association organized under the laws of California, the power of attorney involved contained a specific provision concerning assesments, as follows: "We hereby

subscribe, subject to the call of the advisory board, a sum equal to our total basic annual deposit, to pay excess losses incurred under this contract."

In the Texas case, *Southern Ornamental Iron Works v. Morrow*, which is cited as a controlling authority in the majority opinion of the Texas Supreme Court and upon which respondent mainly relies, 101 S. W. (2d) 336, the contract of the members embodied in the power of attorney which each of them executed, contained a provision that "no one subscriber should ever be required to pay by assessment for such deficits and losses a greater sum than an amount equal to one additional annual premium deposit." (Loc. Cit. Page 388).

It can be seen from the foregoing that these cases conform to the principle of law that petitioners here urge. In each of the foregoing cases either the applicable statute or the contracts of the parties *provided for an assessment* as the means of enforcement, so as to authorize the Court in holding that the members, by becoming such, had impliedly consented to an ex parte determination of the necessity for and the amount of an assessment and consequently were bound by a judgment establishing those facts, although they were not parties to the suit.

The statutes of Texas neither impose a liability nor make a provision for an assessment. *Hill v. Blanco National Bank*, supra. Whether the contract of the members did so is readily ascertainable from inspection, the Power of Attorney relied on by the

Receiver and forming the basis of the judgment in Cause 63621 being found in the printed record. (R. 572). We submit that the contract is silent on the subject.

Respondent undertakes to distinguish the Brusselback case on four grounds, which we shall directly answer:

First: The difference in the relationship between stockholders of a corporation and members of a reciprocal insurance exchange, the former being not liable to assessment at all unless made so by statute, the latter, under Texas law, being under a duty to contribute to a fund to discharge claims against the exchange by virtue of their relationship to each other.

In the first place the existence of the corporate relationship and the correlative right of the corporation to stand in judgment for its stockholders has been a stronger force in the decisions of the courts in the so-called class suits than any other factor. In the next place respondent inaccurately states the law of Texas as to the liability of the members of a reciprocal insurance exchange. The case of *Sergeant v. Goldsmith*, 110 Tex, 482, cited by respondent has been held inapplicable to reciprocals organized under the Title 78, Chapter 20 Revised Statutes (see page 8, ante) and the members of such an exchange, are not liable to contribute any sums in excess of their original premiums unless by their contracts they have expressly so provided. *(Hill v. Blanco National Bank*, supra).

The first ground of distinction therefore is not sound.

Second: That the assessment liability of the petitioners constituted an asset of the exchange whereas this fact was not true in the Brusselback case. To support this contention respondent cites *Mitchell v. Pacific Greyhound*, 91 Pacific 2d 176, but in that case as we have pointed out, the members had expressly, by contract, *subscribed such contingent amounts, subject to call*, so that the case could not apply to the facts of the case at bar.

At Page 32 of the Brief the respondent cites *Art. 5029*, Revised Civil Statutes of Texas, 1925, as authorizing an assessment. Our courts have expressly held to the contrary *(Hill v. Blanco National Bank*, supra). In that case the court stated:

> "Appellant in his motion reiterates his contention that R. S. Arts. 5024 to 5033, inclusive, imposes assessment liability on the subscribers in the reciprocal exchange here involved. Without extended discussion, this court is constrained to adhere to its former opinion holding to the contrary."

Respondent then contends that Sec. 15, 16(a) and 23 of Art. 8308, R. C. S. 1925 (the Workmen's Compensation Statute of Texas) provide the statutory basis for the assessment. These articles of the statute are appended to the reply brief in the appendix thereto.

This contention is briefly answered by stating that reciprocal insurance exchanges are governed by the

provisions of Title 78, Chapter 20 of the statutes, comprising Arts. 5024 to 5033, the last cited article reading as follows:

> "Except as herein provided no insurance law of this state shall apply to the exchange of such indemnity contracts unless they are specifically mentioned."

The Workmen's Compesation law of Texas is divided into four parts and appears as Articles 8306, 8307, 8308 and 8309 of the Revised Civil Statutes. Section 2 of Art. 8309 provides that any insurance company including reciprocal companies shall have the right to issue Workmen's Compensation policies and when it does so it shall be "subject to the provisions of Parts 1, 2 and 4 and of Sections 10, 17, 18(a) and 21 of Part 3, (Art. 8308) of this law.

It is at once apparent that reciprocal insurance companies are not subject to the provisions of Section 15, Section 16(a) and Section 23 of Art. 8308 as contended by the respondent.

The second ground of distinction is therefore not sound.

Third: That petitioners had warning that their respective liabilities to assessment might be determined by class suit by reason of the decision in *Southern Ornamental Iron Works v. Morrow* decided by the Court of Civil Appeals in 1937 (101 S. W. (2d) 336).

This argument would bind petitioners to the result of *Southern Ornamental Iron Works v. Morrow* re-

gardless of the correctness of that decision when measured by the requirements of the 14th Amendment. In effect the argument urges that this Court and petitioners are bound by the determination of the State Court on an interpretation of the Federal constitution, whether it conflicts with the interpretation given it by this Court or not. Of course this Court could not be bound thereby. *Coombs v. Getz*, 285 U. S. 434, 441; *Larson v. South Dakota*, 278 U. S. 429; *Appleby v. City of New York*, 271 U. S. 364; *Stearnes v. Minnesota*, 179 U. S. 223, 232. Neither, we submit, could petitioners who had no part in that case and could not have appealed it to this Court on the constitutional question involved under the due process clause.

If the case has the force ascribed to it by respondent, it conflicts with this Court's later decision in the Brusselback case. Confined to its own facts, however—a case involving a contract under which each subscriber not only agreed to a contingent liability, but on *an assessment as the means of enforcement*, (101 S. W. (2d) 338), *Southern Ornamental Iron Works v. Morrow*, can be reconciled with rule of this Court announced by Chief Justice Stone in the Brusselback case, *Pink v. AAA Highway Express* and *Hansberry v. Lee*.

In either event the distinction which respondent seeks to draw is not tenable.

Fourth: Respondent next asserts that the Brusselback case is inapplicable because it did not involve a

true class suit. A reading of the opinion would indicate that the primary contention in the case was that under Equity Rule 38 the Illinois judgment was conclusive on all stockholders, whether served in the proceeding or not and this Court passed on that question, holding that notwithstanding Rule 38 the judgment could not be binding on absent and uncited shareholders.

But there can be no debate concerning the type of suit involved in *Partridge v. Martin*, 102 Fed. (2d) 284, Cert. Den., 307 U. S. 644. It was a deliberately contrived, all inclusive, class action brought to exploit what counsel evidently thought was a loop-hole in the Brusselback case. The 8th Circuit Court held the decree not binding on absent and uncited shareholders under the authority of the Brusselback case and this Court denied the petition for certiorari and refused to review the holding.

We submit the fourth ground of distinction is therefore invalid.

REPLY TO RESPONDENT'S FIFTH POINT

It is argued that the courts below have held that the Receiver Kelly properly conducted the class suit. To the contrary we say that no court yet has directly held that Kelly's conduct was not improper. An implied finding in the face of the undisputed facts in the case cannot stand and the courts below have not based their decision in this case on any such finding.

We can add nothing to the matter outlined in our original brief. The facts are stated by the witnesses Rogers, Holloway, Evans, Gresham and the Receiver Kelly. The essential facts are undisputed that Kelly made an agreement with Rogers, Holloway and Evans under which they were given settlements in consideration of not further contesting the case (original Brief Page 33-43).

The hard fact cannot be passed by saying that there was substantial evidence to base a holding that no fraud was shown to exist. Even the majority opinion of the court below did not go so far. It escaped the proof by ignoring it. The court referred to the recitation in the original class judgment to the effect that the 3200 members of the class were "fairly and truly represented herein by the named defendants," and then held the recitation conclusive in spite of the fact that Kelly himself prepared the judgment (R. 245) and the trial court could not have had any knowledge of the out-of-court negotiations reflected above.

Respondent's real contention is that the Receiver's fraud in the conduct of the class suit was harmless error because petitioners were bound to lose the case in any event. Such logic would destroy the fundamental requirement of the due process clause that a class suit to be valid must be fairly, honestly and openly tried.

CONCLUSION

We respectfully submit that this Court has jurisdiction to determine the constitutional question presented by the petition and that the petition should be granted as prayed for.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 288

SID W. RICHARDSON, ET AL.,
Petitioners,

vs.

KEITH KELLY, RECEIVER

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Keith Kelly, Receiver.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 288

SID W. RICHARDSON, ET AL.,
Petitioners,

VS.

KEITH KELLY, RECEIVER

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the intermediate appellate court, the Court of Civil Appeals for the Third Supreme Judicial District of Texas, is reported in 179 S. W. (2d) 991 (R. 759-773). The majority opinion of the Supreme Court of Texas and the dissenting opinion of Justices Alexander and Sharp are reported in 191 S. W. (2d) 857 (R. 801-833).

Jurisdiction

Petitioners claim jurisdiction under Judicial Code, Section 237(b), 28 U.S.C., Section 344(b). Respondent submits, as will appear from the Summary of the Argument, that no jurisdiction exists because no federal question is presented by petitioners.

Statement of the Case

Petitioners brought this bill of review proceeding on behalf of themselves and on behalf of a class composed of all other subscribers at National Indemnity Underwriters of America, a reciprocal or interinsurance exchange,* who were not named as parties to the assessment suit but who as members of a class were bound by the judgment entered therein (R. 5, 27, 63, 143), to set aside such judgment, and to relitigate the issue of the liability of the subscribers to assessment. The judgment in the assessment suit (Cause No. 63,621), a class suit proceeding, adjudicated that those named as defendants in such suit were truly representative of and fairly and actually represented the whole class of subscribers at the Exchange (R. 658-659, 665); that the Exchange was insolvent, thereby making it necessary to levy an assessment against the subscribers at the Exchange (R. 660-661); and that each subscriber should pay an assessment equal to the amount of premiums booked and earned on all policies of insurance carried by him during any part of the insolvency period (R. 663).

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* Hereinafter referred to as the "Exchange."

The judgment entered in the assessment suit was a judgment in *rem* and not in *personam*. The judgment, in so far as the members of the class are concerned, names no subscribers and names no sums of money. Under State law, any subscriber sued for his assessment would be sued upon his subscription contract and not upon the judgment entered in the assessment proceeding, and such subscriber, when sued for his assessment, would be free to make any personal defenses available to him, *e. g.*, payment, that he was not in fact a subscriber during the insolvency period, or that the receiver was in error as to the amount of premiums booked and earned on the policies of insurance carried by the subscriber during the insolvency period, or that the party suing to recover the assessment had no interest in the cause of action asserted. *Clay v. Moore* (Tex. Civ. App.), 175 S. W. (2d) 433; *McLean v. Morrow* (Tex. Civ. App.), 137 S. W. (2d) 113, 120, writ dismissed.

The judgment entered in the assessment suit, Cause No. 63,621, contains extensive recitals as to the court's jurisdiction over those sued as members of a class. It recites the impossibility of making all 3200 subscribers parties to the suit; that those subscribers named as parties defendant stood in exactly the same position as the remaining subscribers who were sued as members of a class; and that those named as parties defendant were truly representative of and fairly represented the subscribers at the Exchange (R. 658-659). Under Texas law, these jurisdictional recitals are conclusive until set aside in a direct proceeding. *Southern Ornamental Iron Works v. Morrow* (Tex. Civ. App.), 101 S. W. (2d)

336, 343, writ refused.* This case applies to recitals concerning jurisdiction in class suit judgments, the settled law of the State to the effect that a recital in a judgment that the defendant was served with process is conclusive until and unless the judgment is set aside in a direct proceeding, even though the defendant was not in fact served with process. *Levy v. Roper*, 113 Tex. 356, 256 S. W. 251; *Brown v. Clippinger*, 113 Tex. 364, 256 S. W. 254.

Under State law [*Johnson v. Templeton*, 60 Tex. 238; *Smith v. Ferrell* (Tex. Com. App.), 44 S. W. (2d) 962] as under Federal law [*White v. Crow*, 110 U. S. 183; *Knox County v. Harshman*, 133 U. S. 152; *Marshall v. Holmes*, 141 U. S. 589], a party seeking to set aside a final judgment must allege and prove that he has a good defense which he was prevented from making by fraud, accident or the acts of the opposing party, wholly unmixed with any fault or negligence of his own. These requirements of a direct attack must be met where the judgment recites jurisdiction of the defendant, even though the party against whom the judgment was entered can prove, by showing lack of service upon him or otherwise, that the court did not in fact acquire such jurisdiction. *Treadway v. Eastburn*, 57 Tex. 209; *Switzer v. Smith* (Tex. Com. App.), 300 S. W. 31; *Pure Oil Co. v. Reece*, 124 Tex. 476, 78 S. W. (2d)

* The refusal by the Supreme Court of Texas of an Application for Writ of Error amounts not only to an approval of the judgment of the Court of Civil Appeals but to an approval of that Court's opinion. Hamilton v. Empire Gas & Fuel Co., 134 Tex. 377, 110 S. W. (2d) 561; Humble Oil & Refining Co. v. State (Tex. Civ. App.), 158 S. W. (2d) 336, writ refused.

932; *Martin v. Burns, Walker & Co.*, 80 Tex. 676, 16 S. W. 1072.

The dissenting opinion contains the statement that the class suit judgment may be set aside without the showing of a meritorious defense because "it appears on the face of [the] record that the judgment is void" (R. 833). This is an inaccurate statement of the applicable State law since it has long since been settled in Texas that a judgment which contains recitals showing jurisdiction (as does the one here involved, pp. 3-4, *ante)* may not be set aside except through a bill of review proceeding in which a meritorious defense is pleaded and proved. We have cited above a few of the cases so holding.

The two cases cited in the dissenting opinion in no way support the statement in the opinion. In *Empire Gas & Fuel Co. v. Noble* (Tex. Com. App.), 36 S. W. (2d) 451, 454, one of the cases cited in the dissenting opinion, the Court states: "If a judgment is void, the party against whom it is rendered is not compelled to show a defense to the action in order to enjoin it * * *. However, if a judgment shows *upon its face* to be valid, every presumption will be indulged in favor of it." The judgment here involved "shows upon its face to be valid" since it contains elaborate recitals concerning the court's jurisdiction over those subscribers sued as members of a class.

In *Kern Barber Supply Co. v. Freeze*, 96 Tex. 513, 74 S. W. 303, the other case cited in the dissenting opinion, some question was raised as to the advisability of requiring a party to show a meritorious defense as a prerequisite to setting aside a judgment entered by a court which actually had no jurisdic-

tion over such party. However, any doubt expressed in that case was removed by the Supreme Court of Texas in *Brown v. Clippinger*, 113 Tex. 364, 366, 256 S. W. 254, 254-255, where the Court said:

"The writ of error was granted because of the doubt expressed in Kern Barber Supply Co. v. Freeze, 96 Texas, 516, 74 S. W., 303, whether the rule that a party seeking equitable relief to prevent the enforcement of a judgment against him, not void on its face, must show a meritorious defense to the cause of action on which the judgment was based, was properly applied to actions to set aside apparently valid judgments for want of jurisdiction of the person.

"The judgment which Brown sought to vacate recited facts which sustained the court's jurisdiction. It could not therefore be collaterally attacked with success in the courts of this state. Levy v. Roper, 113 Texas, 356, 256 S. W., 251. *If it was the correct judgment on the merits, a direct proceeding to vacate it would not have had a different result.* For, the party recovering a judgment must be made a party to a proceeding for its vacation, with the right to enforce any subsisting obligation of the complaint on which the judgment was predicated. If the complainant was truly bound to render to the plaintiff in the judgment all that the judgment required, his direct action must end with another adjudication against him having precisely the effect of that sought to be annulled. *Courts of equity do not sit to remedy injuries wholly technical and insubstantial.*"

In the instant case petitioners recognized when they prepared their pleadings that the class suit judgment was not void on its face and that they could only set it aside through a bill of review pro-

ceeding in which they alleged and proved that they had a good defense to the cause of action asserted in the class suit (R. 8-9, 19-27, 79-84, 139-140, 168-172). Furthermore, in the Court of Civil Appeals (R. 750) and in the Supreme Court of Texas (R. 797) petitioners urged that they were entitled to relief because they had a good defense to the cause of action asserted by the receiver in the class suit. *Petitioners have never contended at any point in this proceeding that the judgment entered in the class suit is void on its face and that they are entitled to set it aside without showing a meritorious defense.*

With the settled law of the State in mind, petitioners alleged below that they were not served with process in Cause No. 63,621; that they knew nothing about that suit until the judgment rendered therein had become final, with the consequence that they had no opportunity to appear and present their defense; that they were not adequately represented by the class representatives; and that they had a meritorious defense which they had been prevented from presenting through no fault of their own, the defense being that they were not liable for the assessment sought by the receiver (R. 8-9, 19-27, 79-84, 139-140, 168-172).

The receiver filed answers in the bill of review proceeding, and also filed cross actions against petitioners in which he sought personal judgment against each of them in a sum equivalent to the amount of premiums booked and earned by the Exchange on all policies of insurance held by each such petitioner during the insolvency period or any portion thereof (R. 119-135).

The judgment entered in the bill of review proceeding denied petitioners any relief and gave the receiver judgment against each petitioner in a sum equivalent to the amount of premiums booked and earned by the Exchange on all policies of insurance held by each such petitioner during the insolvency period or any part thereof (R. 185-206).

Under State law a proceeding by bill of review to set aside a final judgment completely reopens the cause in which the judgment was rendered and such cause must be tried anew. *Humphrey v. Harrell* (Tex. Com. App.), 29 S. W. (2d) 963; *Winters Mutual Aid Ass'n v. Reddin* (Tex. Com. App.), 49 S. W. (2d) 1095. In this bill of review proceeding Cause No. 63, 621 was completely reopened. As the Court of Civil Appeals states in its opinion: "They [petitioners] alleged that certain conduct of the Receiver in procuring the assessment judgment amounted to fraud, and that appellant [petitioner] subscribers at the NIU had a meritorious defense to the assessment, in that their respective contracts limited their liability 'to the amount of the premium deposit and the application fee provided for in this policy.' *The trial court heard these matters together and at length,* the statement of facts containing 726 pages, which in part explains the several hundred pages of powers of attorney, the applications for certificates to do business, and policies issued at the office of NIU before and during the insolvency period, photostatic copies of the originals being under the order of the court sent up with the record" (R. 759). Petitioners do not claim that the trial court in any way prevented them from proving

in the bill of review proceeding such defenses as they desired to urge to the cause of action asserted by the receiver in the assessment suit, Cause No. 63,621.

The Court of Civil Appeals affirmed the trial court's judgment upon the ground that petitioners had no defense to Cause No. 63,621, the assessment suit, and consequently were liable for the assessment fixed by the judgment entered in that cause (R. 760-770). In this connection the Court of Civil Appeals states in its opinion: "We prefer, however, to base our decision upon the issue that appellants [petitioners] did not show or prove a meritorious defense to the assessment liability of the subscribers at the NIU, rather than upon the practice questions" (R. 760).

The Supreme Court of Texas not only affirmed the judgments below but that Court also held that petitioners had no defense to the cause of action asserted in the assessment suit, Cause No. 63,621. This holding, while just as clear and explicit as the holding of the Court of Civil Appeals, requires some explanation. The Supreme Court of Texas was primarily concerned with the issue of whether a class suit would lie to assess the subscribers at the Exchange, and in order to determine this issue had to first decide whether *all* subscribers at the Exchange (including petitioners) were subject to assessment. That Court answered this question in the affirmative, *thereby overruling the defense which petitioners claimed to have to the class suit, the defense that they were not liable to assessment.* In holding that *all* subscribers were subject to assessment that Court said: "So, both in Southern Ornamental Iron Works

vs. Morrow, supra, *and in this case*, although the liability of each subscriber was several, *it was properly recognized that the duty to pay assessments was common to all* and resulted in a 'unity between them in the fund from which their rights were to be enjoyed,' and that, therefore, it was a duty which could be enforced in a class suit" (R. 811).

SUMMARY OF THE ARGUMENT

1. No federal question is presented by petitioners' contention that they were denied procedural due process in Cause No. 63,621, the class suit proceeding, because the State courts have held in this proceeding, to which petitioners were *actual* parties, that petitioners have no defense to the cause of action asserted against them in Cause No. 63,621. (See 11-15, *post.)*

2. No federal question is presented by petitioners' contention that they were denied procedural due process in Cause No. 63,621, the class suit proceeding, because petitioners do not contend that they have any defense to the cause of action asserted against them in that suit or that they could prevail in the suit if it should be retried. (See pp. 16-17, *post.)*

3. A class suit proceeding will lie to determine (1) the necessity for an assessment against the subscribers of a reciprocal insurance association; (2) the total amount of money to be raised by the assessment; and (3) the basis upon which each subscriber shall be assessed. Use of such a proceeding does not

deny procedural due process to those subscribers not actual parties to the suit. (See pp. 17-37, *post.)*

4. The finding of the three courts below that the receiver properly conducted the class suit proceeding is supported by substantial evidence and should be upheld. (See pp. 37-44, *post.)*

First Point

Petitioners chose to bring this bill of review proceeding, a proceeding to which they are *actual* parties, to set aside the judgment entered in the class suit. Under settled State law one prosecuting such a suit must plead and prove a meritorious defense to the cause of action asserted in the cause in which the judgment sought to be set aside was entered. In this proceeding the courts below have held that petitioners are entitled to no relief because they have no defense to the cause of action asserted by the receiver in the class suit. Consequently the judgments below rest upon adequate non-federal grounds, and petitioners' contention that they were denied procedural due process in the class suit presents nothing but an abstract question of law.

Second Point

If this Court should hold that petitioners were denied procedural due process in the class suit and if the judgments below should be reversed and the cause should be retried, the same judgments would be entered because petitioners could not meet the re-

quirements imposed by State law upon one prosecuting a bill of review, in that they could not show any defense to the cause of action asserted by the receiver in the class suit. Consequently petitioners' contention that they were denied due process of law in Cause No. 63,621, the class suit proceeding, presents nothing but an abstract question of law which this Court will not decide.

Argument

Petitioners present no federal question because they have had their day in court and have been held liable to assessment under the laws of Texas. Their Petition for Writ of Certiorari and Brief in Support Thereof are concerned only with the class suit; petitioners utterly ignore the fact *that the very issues raised by the class suit have been re-litigated in this bill of review proceeding brought by them*, a proceeding to which they are *actual* parties rather than parties by reason of membership in a class. Petitioners are entitled to their day in court, but conceding *arguendo* that they did not have their day in Cause No. 63,621, the class suit proceeding, *they certainly got it in this bill of review proceeding*, to which they are actual parties and in which they contended below strenuously and at length that they were not subject to assessment. Due process of law does not require that petitioners be given two opportunities to litigate the issue of their liability for assessment. *Baldwin v. Iowa State Traveling Men's Association*, 283 U. S. 522; *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 78.

As shown at pp. 4-5, *ante*, the State law afforded petitioners a means whereby they could set the class suit judgment aside if they could plead and prove that they had a good defense to the cause of action asserted by the receiver in the class suit, which defense they had been prevented from urging by fraud of the receiver and without fault on their part. Petitioners elected to avail themselves of this remedy furnished by State law, but they were unsuccessful in their suit because both the Court of Civil Appeals and the Supreme Court of Texas held, as pointed out at pp. 9-10, *ante*, that petitioners have no defense to the cause of action asserted by the receiver in the class suit; that they are liable for the assessment fixed by the judgment entered in that suit. Consequently the judgments below rest upon an adequate non-federal ground and will not be disturbed by this Court. *Fox Film Corporation v. Muller*, 296 U. S. 207; *Capital Endowment Co. v. State of Ohio, ex rel. Bowen*, 296 U. S. 546; *Holley v. Lawrence, Warden*, 317 U. S. 518.

If the judgments below should be reversed and the cause retried the same judgments would be entered because petitioners have no defense to the cause of action asserted by the receiver. Under these circumstances petitioners' contention that they were denied due process of law in the class suit presents nothing but an abstract question of law which this Court will not decide. *New Jersey v. Sargent*, 269 U. S. 328. "But no court sits to determine questions of law *in thesi*." *Marye v. Parsons*, 114 U. S. 325, 330.

Petitioners do not directly contend that the bill of review proceeding which they elected to prosecute

denied them the right to adequately contest the issue of their liability for assessment. At common law, and in most jurisdictions today, and in the federal courts a bill of review proceeding is the remedy furnished a defendant who desires to set aside a judgment entered by a court which he claims had no jurisdiction over him. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 244. This Court has held that such a proceeding is consonant with due process of law. *Freeland v. Williams*, 131 U. S. 405, 418; *Louisville and Nashville R. R. Co. v. Schmidt*, 177 U. S. 230. Petitioners do complain of the fact that they had the burden of proof in the bill of review proceeding and in this connection state:

"All the petitioners ask is that they be permitted, in a fair and openly conducted trial, to have their day in Court where they may openly contest and litigate every step essential to the establishment of liability against them, *and where the burden of proof will be cast on the Receiver to prove up his case rather than on the Petitioners to disprove it* as has been their burden on this Bill of Review." (Brief, p. 46.)

The above quotation at long last sums up petitioners' case. Since they have had a "fair and openly conducted trial," their real contention is that they have been denied due process of law because they had the burden of proof in the bill of review proceeding; whereas in the class suit proceeding the burden rested upon the receiver. This Court has many times held that such a contention presents no constitutional question. *Easterling Lumber Co. v. Pierce*, 235 U. S. 380, 382; *Minneapolis & St. Louis*

R. R. Co. v. Minnesota, 193 U. S. 53, 63; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 81-82; *U. S. v. Illinois Central R. R. Co.*, 291 U. S. 457, 463-464. Petitioners voluntarily chose to file this bill of review proceeding, knowing that the burden of proof rested upon them, and it would seem unbecoming of them to now complain of the fact that they had the burden of proof in such proceeding.

Two remedies were available to petitioners to obtain relief from the class suit judgment. First, they were entitled under the settled State law to file this bill of review proceeding to have the class suit judgment vacated. Second, they were each entitled to await the filing of a suit by the receiver in an effort to collect from each the assessment decreed by the class suit judgment. Petitioners elected to resort to the remedy first mentioned—this bill of review suit. Having resorted to that remedy, the settled law of the State imposed upon them the burden of proving not only that the class suit judgment was invalid but that they had a meritorious defense to the cause of action asserted against them in that suit, for the reason that "it would be useless for a court of equity to set aside one judgment when the principles of equity would require another adjudication of like import." *Brown v. Clippinger*, 113 Tex. 364, 366, 256 S. W. 254, 255. Having elected to resort to this bill of review proceeding, in which the burden mentioned rested upon them, it is unnecessary to consider or decide what would have been their rights or burdens if each petitioner had awaited suit by the receiver to collect the assessment owed by each such petitioner.

Third Point

The State law gave petitioners a remedy consonant with due process of law, the right to file a bill of review proceeding in which they could have set aside the class suit judgment upon proof that they had a good defense to that suit which they had been prevented from urging by fraud of the receiver and without fault on their part. Petitioners elected to file such a suit; lost it, and now appeal to this Court to reverse the judgments below, but in such appeal do not claim to have any defense to the class suit, which means that they do not claim that they could obtain a favorable judgment if the judgments below should be reversed and the cause tried again. Consequently petitioners are asking this Court to decide a constitutional question when such decision is unnecessary to protect petitioners' rights.

Argument

As shown at pp. 12-13, *ante*, the State law gave petitioners a remedy consonant with due process of law, the right to file a bill of review proceeding to set aside the class suit judgment. As there shown, successful prosecution of such a proceeding would have required petitioners to plead and prove, among other things, that they had a good defense to the cause of action asserted by the receiver in the class suit.

Petitioners elected to avail themselves of the remedy furnished by the law of the State, but they were unsuccessful because, as pointed out at pp. 9-10

ante, the Court of Civil Appeals and the Supreme Court of Texas both held that petitioners have no defense to the cause of action asserted by the receiver in the class suit; that they are liable for the assessment fixed by the judgment entered in that suit. *But even if the courts below had not decided the issue of meritorious defense*, petitioners would present no Federal question of substance *because they do not claim to have any defense to the cause of action asserted by the receiver*. On the contrary, they dismiss the question of defense with the statement: "The question of meritorious defense, however, is not necessary to a decision of the Due Process questions before this Court." (Brief, p. 17.)

Why reverse the judgments below and retry the cause when petitioners in effect admit that the same judgments would have to be entered because of their inability to present a defense? It is plain that petitioners are seeking to have this Court decide a constitutional question, or an alleged constitutional question, when such decision is unnecessary to protect petitioners' rights. This Court will not decide the constitutional question in these circumstances. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 345-348 (concurring opinion of Mr. Justice Brandeis); *Voeller v. Neilston Warehouse Co.*, 311 U. S. 531, 537.

Fourth Point

In Cause No. 63,621, the class suit proceeding, the court determined (1) the necessity for an assessment against the subscribers; (2) the total amount

of money to be raised by the assessment; and (3) the basis upon which each subscriber should be assessed. Petitioners were not served with process in that cause but they were made defendants as members of a class composed of all subscribers to the Exchange, a class all members of which rested under the *common* duty of creating a fund to discharge the obligations of the Exchange; and this class was represented in the cause by a group of subscribers who appeared and defended on their own behalf and on behalf of the class of which they and petitioners were members. This representation afforded petitioners due process of law.

Argument

Since the judgments below rest upon adequate non-federal grounds (pp. 11-15, *ante*), petitioners' contention that they were denied procedural due process by the class suit presents nothing but an abstract question of law. We will reply to petitioners because we believe their position, even in the abstract, is untenable.

Cause No. 63,621, the class suit, was prosecuted by a receiver appointed by a State court under State statute to liquidate the insolvent exchange or association of which petitioners were members (R. 761-762). In that proceeding the receiver sought a judgment decreeing that the Exchange was insolvent; that an assessment should be levied against the subscribers in order that the obligations of the Exchange might be discharged; that the subscribers were subject to assessment; and the rate of assess-

ment required to liquidate the Exchange (R. 762-763). In prosecuting this proceeding the receiver acted as the representative of injured workmen who were entitled to workmen's compensation payments under policies issued by the Exchange and as the representatives of all other parties who were creditors of the Exchange (R. 561-562, 657).

While petitioners contend that the "purpose of the suit was to impose a *personal* liability on the absent subscribers for the debts of the Exchange (Brief, p. 30), it is plain, as pointed out at p. 3, *ante*, that under State law the judgment sought in that suit and the judgment actually entered therein imposed no personal liability upon the absent subscribers. The judgment determined nothing but (1) the necessity for an assessment; (2) the total amount of money to be raised by the assessment; and (3) the basis upon which each subscriber should be assessed, that is, the manner in which the liability should be *prorated* among the subscribers.

The judgment entered did not go nearly so far in determining the ultimate liability of the subscribers as did the judgment considered by this Court in *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, a judgment "that a call or assessment be, and the same is hereby, made upon the stock and stockholders of the said company, * * * of thirty-five per centum of the par value of the shares of said stock subscribed for or held by them, being eight dollars and seventy-five cents on each and every share thereof." (162 U. S. 332.) This Court held that such judgment was not "a judgment against anyone" (162 U. S. 337); and that it was binding upon all stockholders, al-

though entered in a suit against the corporation to which the stockholders were not parties. See also *Converse v. Hamilton*, 224 U. S. 243, 256.

Use of a class suit to determine the foregoing questions did not deny procedural due process to those subscribers not made actual parties to the suit *because the relationship between the subscribers was such as to make it appropriate for a group of the subscribers to represent all of the subscribers.* There is more to a reciprocal insurance exchange or association than a bundle of contracts (powers of attorney) signed by the subscribers or members. Such an association functions as an entity and the members thereof acquire a *status* simply by reason of the fact that they are members. As Mr. Justice Holmes has stated: "The act of becoming a member [of a mutual association] is something more than a contract, *it is entering into a complex and binding relation*, and as marriage looks to domicile, membership looks to and must be governed by the law of the State granting the incorporation." *(Modern Woodmen of America v. Mixer*, 267 U. S. 544, 551.) In determining the relationship between the subscribers of the reciprocal association here involved the State courts necessarily considered the reciprocal contracts and the applicable Texas statutes, all matters of purely local concern. *Pink v. A. A. A. Highway Express*, 314 U. S. 201, 211.

Any effort to compel a reciprocal association to meet its obligations is an effort to make the individual subscribers as a *group* meet obligations owed as a *group*. In fact the unity of the members of the reciprocal association here involved was an accom-

plished fact long before the institution of the class proceeding and long before the association was placed in the hands of a receiver. The members voluntarily achieved unity by operating as a reciprocal insurance exchange. The unity of the members was such that the members as a *group* wrote policies of insurance (R. 761-762). The unity of the members was such that the members, the class, could incur obligations in a *common name. Mayhew & Isbell Lbr. Co. v. Valley Wells Truck Growers' Ass'n* (Tex. Civ. App.), 216 S. W. 225.

The unity of the members of the reciprocal was such that they or it obtained a license to operate as an association through the members making common representations to the Board of Insurance Commissioners through a common agent (R. 770). The unity of the members of the association was such that they, the class, by issuing workmen's compensation policies thereby took from their employees the common law rights of such employees and required such employees and doctors, nurses and hospitals rendering services to them to look alone to the association for payment. (Art. 8306, Vernon's Ann. Civ. Stats. of Texas.) The unity of the members of the association was such that they were jointly and severally liable for claims of third parties. *Sergeant v. Goldsmith Dry Goods Co.*, 110 Tex. 482, 221 S. W. 259. In that case, the Supreme Court of Texas stated:

"As to third persons dealing with the association and to whom it incurred lawful debts contracted within the powers of whatever agency it employed, * * * the members of the association, as stated before, *are jointly and severally liable as principals.*

They could not create an organization, give it a name, invite others to sell it supplies or render it services, for instance, for their benefit, and not as principals be liable for such debts. The association was a fiction except as the members stood behind it. They are necessarily liable for debts to third persons incurred in carrying out the purposes for which they were associated. *They were the association.* Such transactions inured to their joint and several benefit. They should in the same measure pay what is owing upon them." (110 Tex. 490, 221 S. W. 261.)

In the instant case the receiver did not seek to impose joint and several liability upon the subscribers, but this in no way detracts from the fact that under State law the members of a reciprocal insurance association are jointly and severally liable in so far as claims of third parties are concerned. In this connection, the statement in the dissenting opinion that "regardless of what may have been the liability of the parties under the relations that *actually* existed among them, the suit under consideration was on alleged several obligations, and the judgment actually recovered was several, and not joint" (R. 826), furnishes no support for the position of the dissenting justices because "the relations that *actually* existed among them" (the subscribers) is of the greatest importance in determining whether or not a group of subscribers could stand in judgment for all subscribers.

The duties which the members incurred were reciprocal duties. In a reciprocal association like duties and obligations are exchanged. The duty owed by one party to a reciprocal undertaking necessarily af-

fects and is related to the duty of every other party thereto. The duty which the members of a reciprocal owe to each other, injured workmen and other creditors is at the very least a *common* duty . It is the duty to provide a fund to pay claims. This burden descends upon a party when he becomes a member of a reciprocal association, and not by reason alone of any language in the contract signed by him, but by reason of his *becoming a member* of the association, and a party to a reciprocal undertaking.

All members of the association are interested in the duty owed by them as a *group*, the duty to satisfy the obligations of the association. Their interest is common. Since all may be called upon to raise a fund to satisfy obligations of the association of which they are members, all are interested in *how* the fund shall be raised. Consequently their interest is common. Their duty is the same. The burden to be shouldered by one subscriber is the same as the burden to be shouldered by every other subscriber.

It seems plain from the foregoing that the relationship between the members or subscribers of a reciprocal insurance association is such that the question of whether the members shall be assessed and the amount thereof may be determined in a class suit proceeding in which a group of the subscribers represent all of the subscribers. The class suit device is commonly used and its use has been upheld by the courts without exception. *Southern Ornamental Iron Works v. Morrow* (Tex. Civ. App.), 101 S. W. (2d) 336, writ refused; *Gray v. Moore* (Tex. Civ. App.), 172 S. W. (2d) 746; *Mitchell v. Pacific Greyhound Lines* (Cal. Ct. of App.), 91 Pac. (2d) 176;

Irwin v. Missouri Valley Bridge & Iron Co. (C. C. A. 7), 19 Fed. (2d) 300, cert. den. 275 U. S. 540.

That a class suit may be filed in such a situation is demonstrated by Rule 23 of the Federal Rules of Civil Procedure which allows a class suit "when the character of the right sought to be enforced for or against the class is * * * joint, *or common.*" While this rule speaks of a "right" it is obvious that the rule has application when the *duty* sought to be imposed upon a class is a common duty. The language a "right sought to be enforced * * * against the class" is nothing but a somewhat clumsy reference to a "*duty* sought to be imposed * * * upon the class." 2 *Moore's Federal Practice*, pp. 2237-2238.

In the treatise last mentioned (pp. 2235-2245) Professor Moore discusses the binding effect of a judgment rendered in a true class action, the effect of a judgment rendered in a spurious class action, and the effect of a judgment rendered in a hybrid class action. In grouping the cases he places *Southern Ornamental Iron Works v. Morrow* (Tex. Civ. App.), 101 S. W. (2d) 336, writ refused, a case holding that a class suit will lie to assess the members of a reciprocal insurance association, in the category of true class actions; he does so because the right sought to be enforced against the members and the duty sought to be imposed upon the members is *common* (p. 2289).

The dissenting opinion below (R. 817-833) is fundamentally erroneous because it is based upon the hypothesis that the rights held by each member of a reciprocal insurance association and the duties owed by each member are separate and distinct and

entirely unrelated to the rights held by, and the duties owed by, the other members; and that the rights held and the duties owed by a member depend entirely upon whatever bargain the member may have made with the association. The error in this assumption is exposed by the very name applied to the association here involved, *reciprocal* insurance association. It is obvious that an association is not *reciprocal* where the rights and duties owed by one member are entirely unrelated to the rights and duties owed by other members. In truth and in fact such rights and duties are, at the very least, *common* rights and duties; and the dissenting justices erred in holding otherwise.

The dissenting opinion is also fundamentally erroneous because it assumes that the judgment entered in the class suit was a judgment *in personam* against each subscriber. This is not true, as we point out at pp. 3, 19-20, *ante*.

This Court has held that procedural due process is not denied absent members by a class suit to assess the members of a mutual insurance association. In *Hartford Life Insurance Co. v. Ibs*, 237 U. S. 662, the mutual department of the company had forfeited Ibs' policy by reason of his failure to pay an assessment levied to meet some one hundred forty-five claims. When Ibs' widow sued on the policy the defense was forfeiture. In reply, the widow contended that the assessment levied to meet the 145 claims was invalid because there was then in the fund involved sufficient money to pay the 145 claims; that as a consequence the attempted forfeiture of Ibs' policy was ineffective.

In rebuttal, the company offered in evidence the judgment of a Connecticut court holding that the company had the right to maintain the fund as a reservoir to pay claims promptly *and that the company could make such an assessment as that levied against Ibs.* That judgment had been rendered in a suit brought by 31 members of the mutual department of the company for themselves and some 12,000 other members, as a class, against the company *to determine the company's right to assess the members to maintain the fund.*

In considering the effect of the Connecticut decree this Court said: "On that issue the Connecticut decree was admissible, since it adjudged that the Company had the right to make advances to pay claims *and could subsequently collect the amount of such claims by an assessment levied as in the present case.* Its right so to do having been determined by a court of competent jurisdiction, the decree was binding between the parties or their privies in any subsequent case in which the same right was directly or collaterally involved." (237 U. S. 673.)

We earnestly maintain that the court which entered the class suit judgment here involved had the same authority as the Connecticut court; that is, the authority to determine what assessment should be levied on the members of the association. We further submit that if the class proceeding upheld in the *Ibs* case afforded due process to those represented as members of a class, the instant proceeding did likewise.

In *Supreme Tribe of Ben-Hur v. Cauble,* 255 U. S. 356, the 70,000 members of Class "A" of the society

were held bound by a decree entered in a proceeding in a Federal court of Indiana in which they were represented by 500 members. One of the questions presented in that proceeding was:

"The right of the Supreme Tribe of Ben-Hur to require members remaining in Class 'A', and not transferring to Class 'B', to pay a sufficient number of monthly payments, or assessments, to meet the death losses in Class 'A'." (255 U. S. 358.)

In holding that the Indiana suit was a true class proceeding; that the right to entertain it was not dependent upon any rule of the Court; and that all members were bound by the decree entered therein, this Court said:

"* * * It is true that jurisdiction, not warranted by the Constitution and laws of the United States, cannot be conferred by a rule of court, but class suits were known before the adoption of our judicial system, and were in use in English Chancery. Street's Federal Equity Practice, vol. 1, § 549.

"* * * * * * *

"If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented. The parties and the subject-matter are within the court's jurisdiction. It is impossible to name all of the class as parties, where, as here, its membership is too numerous to bring into court. The subject-matter included the control and disposition of the funds of a beneficial organization and was properly cognizable in a court of equity. *If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree.*" (255 U. S. 366, 367.)

In the dissenting opinion below is the statement that the *Ibs* and *Cauble* cases "involved the rights of the members of the alleged class in property owned by them in common. None of them involved an attempt to recover on the several obligations of the members of the alleged class" (R. 824). This statement is inaccurate. In so far as the two cases are relied upon by us, they involved, not a fund owned in common, but the right of a particular association *to assess its members.* In the *Ibs* case this Court held that the class suit judgment conclusively determined the company's right to assess members of the mutual department; and in the *Cauble* case this Court held that the class suit judgment conclusively determined the right of the association "to require members remaining in Class 'A', * * * to pay a sufficient number of monthly payments, or assessments, to meet the death losses in Class 'A'." (255 U. S. 358.) Exactly the same issue was determined in the class suit here involved, *i. e.*, the right of the receiver of the association *to assess the members of the association.*

In *Royal Arcanum v. Green*, 237 U. S. 531, the governing body of the mutual had changed the by-laws, and thereby increased the rates charged the members. Thereafter, 16 members, on behalf of themselves and thousands of other members, filed a class suit against the association to vacate the by-laws on the ground that the change was "violative" of *contract* rights." (237 U. S. 537.) In that litigation a judgment was entered holding the increase in rates valid.

After the foregoing judgment was handed down

the validity of the increase in rates was at issue in litigation between the association and the widow of one Green, a deceased member of the association. In this litigation this Court, in holding that the decree in the class suit that the increase in rates was valid was conclusive, said:

"Indeed, the accuracy of this conclusion is irresistibly manifested by considering *the intrinsic relation between each and all the members concerning their duty to pay assessments* and the resulting indivisible unity between them in the fund from which their rights were to be enjoyed. The contradiction in terms is apparent which would rise from holding on the one hand that there was a collective and unified standard of duty and obligation on the part of the members themselves and the corporation, and saying on the other hand that the duty of members was to be tested isolatedly and individually by resorting not to one source of authority applicable to all but by applying many divergent, variable and conflicting criteria. In fact their destructive effect has long since been recognized." (237 U. S. 542.)

What possible distinction can be drawn between the foregoing case and the instant case? There, the question involved was as to the rate of assessment of the members. Each member rested under the burden of paying assessments; the burden was *common* to all. The very subject-matter of the class suit was the *common* duty which rested on the members. It was held that the class suit judgment was conclusive as to those not actually parties, even though these latter contended that the decree fixing their rate of assessment was "violative of contract rights." (237 U. S. 537.)

In the class suit involved in the instant case the question was as to the rate of assessment of the members. The burden of paying assessments rested upon all members as a *group*. The members rested under a *common* duty, just as did the members involved in *Royal Arcanum v. Green*.

As a final argument here let it be supposed that the Exchange, acting through the attorney in fact, had levied the assessment here involved and had attempted to collect such assessment from the members. It seems clear to us that in such situation those members who took the position that their rights were violated by the levying of the assessment could have brought a suit on their own behalf and on behalf of all other members to determine the right of the association to levy and collect the assessment and that such a proceeding would have been compatible with procedural due process. That is exactly what was done in the *Ibs* and *Ben-Hur* cases. If the members could bring a class suit to test the validity of an assessment made by the association, it follows that a class suit could be brought against the members to determine the same thing.

Petitioners rely almost entirely upon this Court's opinion in *Christopher v. Brusselback*, 302 U. S. 500. That case is not in point for the following reasons:

First: There is no such relationship between a corporation's stockholders who are by statute made liable to an assessment (the situation involved in the *Brusselback* case) as there is between the members or subscribers of a Texas reciprocal insurance exchange. The corporation is an entity separate and

apart from its stockholders and the stockholders are not subject to assessment at all unless made so by statute; whereas, under State law, the members of a reciprocal insurance association *are the association. Sergeant v. Goldsmith Dry Goods Co.*, 110 Tex. 482, 490, 221 S. W. 259, 261. (See pp. 21-22, *ante.)* Under State law the members are jointly and severally liable for the claims of third parties, and even where the claims of the subscribers themselves are involved the members of the association rest under a *common* duty, the duty to create a fund to discharge such claims. Obviously, there is a closer relationship between such members than there is between a corporation's stockholders who are by statute made liable to assessment. A holding that under certain circumstances a class suit will not lie to assess the latter, even if made in the *Brusselback* case (which respondent denies), is not controlling in a case involving the propriety of a class suit to assess the members of a reciprocal insurance association.

Second: The holding in the *Brusselback* case is based squarely upon the proposition that the assessment liability of the stockholders there involved did not constitute an asset of the corporation which could be availed of by the corporation or its receiver, with the consequence that a court could not do what was done in *Hawkins v. Glenn*, 131 U. S. 319, *i. e.*, order the assessment which should have been made by the corporation itself. In *Hawkins v. Glenn*, this Court held that a court of equity could entertain a suit against a corporation to fix the liability for assessment of its stockholders and that any decree entered

in the suit would bind all stockholders of the corporation, even those not made parties to the suit, upon the ground that they were adequately represented by the corporation. That holding was explained and approved in the *Brusselback* case upon the ground that the Court in *Hawkins v. Glenn* was ordering done what the corporation itself should have done—assess the stockholders. However, that holding was held inapplicable in the *Brusselback* case because the assessment liability of the stockholders there involved was not an asset of the corporation and their obligation to creditors (liability to assessment) was an obligation which could not have been enforced by the corporation itself or by its receiver. Consequently, this Court held in the *Brusselback* case that the corporation could not stand for its stockholders.

In the instant case the subscribers' liability to assessment is an asset of the Exchange *(Mitchell v Pacific Greyhound Lines* (Cal. Ct. of App.), 91 Pac. (2d) 176, 180), and the Exchange itself, or rather the attorney in fact for the members or subscribers, should have assessed the members in a sufficient amount to satisfy the obligations of the Exchange. Article 5029, Vernon's Ann. Civ. Stats. of Texas (set out at page 52 of Petitioners' Brief) provides that the members of a reciprocal association shall at all times maintain a reserve of not less than ten thousand dollars, and that if the reserve falls below this amount, "then the subscribers, or their attorney for them, shall make up any deficiency." Under this statute the Exchange, or rather the attorney in fact who operated the Exchange, should have forced the subscribers to maintain the *constant* reserve re-

quired. It was the failure to perform this statutory duty that led to the insolvency of the Exchange, and resulting receivership; and which created the necessity for assessment of the subscribers. Furthermore, Sections 15, 16a and 23 of Article 8308, Vernon's Ann. Civ. Stats. of Texas, a workmen's compensation statute (Appendix, pp. 46-47), require any association writing workmen's compensation insurance (the main business of the Exchange here involved, R. 817) to maintain a reserve "sufficient for the payment of its incurred losses and expenses," and provide that if such reserve is not maintained, the association "shall make an assessment for the amount needed to pay such losses and expenses." This liability for assessment constitutes an asset of the association. *City of Tyler v. Texas Employers Ins. Assn.* (Tex. Com. App.), 288 S. W. 409, 412.

It is plain from the foregoing that the assessment liability of the subscribers here involved constituted an asset of the Exchange, and it is further plain that the attorney in fact for the subscribers should have required the subscribers to pay an assessment in an amount sufficient to take care of the obligations of the Exchange. If this is an obligation which the association or its attorney in fact could have enforced against the subscribers, then it is likewise an obligation which can be enforced through a court of equity. The principle in *Hawkins v. Glenn*, 131 U. S. 319, is applicable, the only difference between this case and that case being that in *Hawkins v. Glenn* the corporation stood for its stockholders, who were subject to assessment; whereas, in the instant case a group of subscribers who were subject to assess-

ment represented all subscribers of the Exchange. If virtual representation was justified in *Hawkins v. Glenn* and if that proceeding did not deny due process of law to the stockholders who were not actual parties to the suit, then petitioners were not denied due process of law in the instant case by reason of the fact that they were represented in the assessment suit by a group of subscribers selected to represent them as a class.

Third: In the *Brusselback* case this Court emphasized the fact that no procedure whereby the stockholders of the corporation might be assessed had been provided by statute or by rules governing the corporation, with the consequence that the stockholders had no "warning" that they might be assessed in such an action as was there involved. (302 U. S. 504.) The contrary is true in the instant case because it had been determined in an opinion approved by the highest court of the State that subscribers or members of a reciprocal insurance association could have their liability for assessment determined in a class suit, *i. e.*, a suit brought by a receiver of the Exchange against a group of subscribers selected to represent a class composed of all subscribers. The opinion so holding *(Southern Ornamental Iron Works v. Morrow* (Tex. Civ. App.), 101 S. W. (2d) 336, writ refused) was handed down in January, 1937, whereas the Exchange here involved was not even placed in the hands of a receiver until December, 1937 (R. 802). Consequently petitioners and other subscribers had "warning" before their Exchange was placed in the hands of a receiver and long

before the assessment suit was filed that their liability for assessment could be determined in a class suit. By becoming members of the Exchange or by retaining their membership therein, after the warning given in *Southern Ornamental Iron Works v. Morrow*, petitioners and other subscribers assumed the risk that a selected group of subscribers might stand in judgment for all of them. (302 U. S. 504.)

Furthermore, even before the decision in *Southern Ornamental Iron Works v. Morrow* the subscribers of this reciprocal association knew that they rested under the duty of maintaining a fund adequate to take care of all claims; and they further knew that if they failed to perform their duty they could be brought to account through the "powers and procedure of a court of equity." *(Hawkins v. Glenn*, 131 U. S. 319, 330.)

Fourth: The *Brusselback* case did not involve a true class action. In that case the liability for assessment of the stockholders was not sought to be established in a plenary proceeding brought by *all* creditors or by a plaintiff representing *all* creditors. On the contrary, it was brought by "*certain* bondholders of the bank." (87 Fed. (2d) 762.) Furthermore, the proceeding was not brought against certain stockholders as representatives of a class but was brought against the "bank and all its stockholders," but service was had only upon stockholders residing in Illinois. (302 U. S. 501.)

It is plain from the foregoing that the *Brusselback* case did not involve a plenary proceeding brought by all creditors or a representative of all creditors (such

as a receiver) against certain stockholders sued as representatives of a class composed of all stockholders. For this reason the principle of that case has no application here where the receiver, on behalf of all creditors, sued a group of subscribers as representatives of a class composed of all subscribers.

Petitioners also rely upon *Hansberry v. Lee*, 311 U. S. 32, but that case is not remotely in point. There the prior decree which it was claimed rendered certain issues *res judicata* was entered in a suit brought by a single landowner in the restricted area on behalf of herself and other property owners in like situation to enforce an agreement allegedly executed by the property owners in the area, which stipulated that no part of the land in the restricted area should be sold to a negro. This Court held that the decree did not bind those who were opposed to enforcing the agreement and who were not parties to the prior litigation.

In the *Lee* case the judgment showed on its face that it was not binding upon Lee, *et al.* The very fact that the judgment was entered showed that there were two classes of property owners—those who desired to enforce the restriction and those who were opposed to its enforcement. *Yet there was no representation either through use of the class suit device or otherwise of those who were opposed to enforcement of the agreement.* The four individuals who were named as defendants in the first suit were not sued as representatives of a class; that is, as representatives of those landowners who did not desire that the covenant be enforced. It was obvious, there-

fore, from an examination of the judgment entered in the prior suit that Lee, *et al.*, were not represented in that proceeding and that they could not be bound by the judgment entered therein. In fact the judgment entered in the prior suit did not purport to bind those not named as defendants. (311 U. S. 46.)

In the *Lee* case each property owner had the right to elect whether he desired to enforce the covenant or oppose its enforcement. In the instant case no subscriber had the right to elect whether or not he would abide by his reciprocal undertaking.

In the dissenting opinion the point is made that all members of the class, the subscribers at the Exchange, did not have the same interest; that some of them were interested in having an assessment made, whereas others were interested in defeating any assessment (R. 830-831). There is nothing in this record to support any such conclusion, which probably explains *why petitioners make no such contention here.* Since petitioners make no such contention, we will give no further consideration to this phase of the dissenting opinion.

Fifth Point

The finding of the three courts below that the receiver properly conducted the class suit proceeding is supported by substantial evidence and should be upheld.

Argument

We will now consider the abstract question of whether petitioners were denied due process of law

by the manner in which the receiver conducted the class proceeding. This question is purely abstract because, as already pointed out at pp. 11-17, *ante*, petitioners have no defense to the cause of action asserted against them by the receiver, with the consequence that they cannot, under settled principles of State law, successfully prosecute a bill of review proceeding to set the class suit judgment aside, irrespective of any fraud that may have been perpetrated upon them by the receiver. What difference does it make whether petitioners were properly represented in the class proceeding now that the courts below in a proceeding to which petitioners were *actual* parties, have held that judgment should have gone against petitioners *in any event?*

We cannot accept as complete or accurate petitioners' statement as to the receiver's conduct. Petitioners seek to create the impression that the receiver prevented the 32 defendants and interveners in the class suit from obtaining a holding that the policies issued by the Exchange were non-assessable. This contention is not supported by the weight of the evidence.

The Court of Civil Appeals, after reviewing the voluminous record, held:

"* * * the evidence would support implied findings of the trial court * * * that the Receiver was not guilty of misconduct amounting to fraud in obtaining the assessment judgment in Cause No. 63,621." (R. 760.)

The Supreme Court of Texas made a similar holding (R. 816).

Mr. Kelly, the receiver, denied that he selected the class defendants so as to avoid a contest (R. 266). He checked Dun & Bradstreet for solvency of every defendant (R. 261). Twenty-five defendants in the first suit, No. 61,773, were also parties to the second suit, No. 63,621 (R. 511-528, 554-556). Mr. Kelly testified that he omitted from the second suit Sid Richardson and others who had filed pleas of privilege in the first suit, because he was afraid he could not maintain venue against them (R. 266).[1]

In the instant proceeding over one hundred subscribers (including petitioner Mid-Co Gasoline Company, whose pleadings were adopted by petitioners Sid W. Richardson and Richardson Oils, Inc., R. 173) sued these same parties as class representatives. *The same parties selected by the receiver as class representatives in the original proceeding, No. 63,621, were also selected and sued by these petitioners as class representatives in the instant suit* (R. 2, 63-64). If these parties afforded adequate representation of the class in the instant proceeding it would seem that they afforded such representation in Cause No. 63,621.

Petitioners' criticism of the amounts owed by the class representatives in Cause No. 63,621 is likewise unfounded. The premiums booked and earned from the 3200 subscribers amounted to only $402,000.00, making the average assessment less than $126.00 (R. 663). Most of the 123 subscribers who participated in this bill of review proceeding owed

[1] Petitioners agreed with him (R. 139, 154). See Royal Petroleum Corp. v. McCallum, 134 Tex. 543, 135 S. W. (2d) 958.

small amounts. Two owed only $1.79; nine owed less than $10.00 each; thirty-five owed less than $100.00 each (R. 838-841).

As to the thirty-two defendants and interveners in the original proceeding, No. 63,621, the record shows:

Two[2] were dismissed. One had died, the other could not be served (R. 267).

Six[3] defaulted. None of these parties testified. There is no evidence the receiver prevented them from defending the suit.

Five[4] answered by their attorneys and tendered into court the amount of their assessments. None of these parties testified. Their attorneys did not testify. There is no evidence Mr. Kelly influenced their actions.

Five defendants[5] filed defensive pleadings, but did not appear at the trial. None of said parties testified. Their attorneys did not testify. There is no evidence Mr. Kelly ever discussed the case with them or with their attorneys.

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[2] W. C. Moore and H. E. Cannon.

[3] Bell Furniture & Mattress Company, Inc.; H. E. Caton; O. G. Hanseler; Harry Knox Company; A. S. Hull d/b/a Hull Stationery & Printing Company; Lockhart's, Inc. (R. 652).

[4] Morris Catchman (R. 624); Lockhart Produce Company, Inc. (R. 643); C. W. Lott (R. 618); Oakhurst Land Company (R. 617); O. K. Warehouse Company (R. 616).

[5] Frank Del Curto (R. 645); Edwin M. Dezendorf (R. 641); O. P. Lockhart (R. 619); Gus J. Moos (R. 642); Owens-Snebold Oil Corp. (R. 621).

Six other denefdants* answered but did not appear at the trial. These parties did not testify. Carlisle Cravens of Cantey, Hanger, McMahon, McKnight & Johnson, was the attorney for three of them (R. 254-256). He did not testify. Mr. Kelly testified no agreement was made with Cravens prior to trial (R. 256). There is no evidence that Mr. Kelly prevented his attendance at the trial. Another subscriber, Rogelein Packing Company, was represented by the firm of Terrill, Davis, Hall & Clemmons. No member of that firm testified. There is no evidence that Mr. Kelly prevented their attendance at the trial, although he had discussions with Mr. Hall (R. 259).

Sterling P. Holloway testified concerning a settlement agreement (33 1/3 per cent discount) for Brownwood Public Service Co., but admitted that a dispute existed as to the amount of the premiums booked and earned on his client's policy (R. 317). This settlement was denied by Mr. Kelly (R. 260), and was never consummated (R. 314). Several months after the class decree the parties were still negotiating (R. 315).

Great stress is laid upon Kelly's alleged statement to Rogers, attorney for Foxworth-Galbraith Lumber Company, "You have caused me a lot of trouble about this thing." Rogers testified that Kelly was "joking

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*Rogelein Packing Company, represented by Terrill, Davis, Hall & Clemmons (R. 646); B. C. Bates, J. M. Garrett, and National Livestock Commission Company of Texas, represented by Cantey, Hanger, McMahon, McKnight & Johnson (R. 632, 633, 639); Brownwood Public Service Co., represented by Thompson & Barwise (R. 626); Foxworth-Galbraith Lumber Company, represented by Kilgore & Rogers of Wichita Falls (R. 630).

and laughing" at the time the statement was made (R. 301). Kelly testified that, while discussions of settlement were had with Rogers before the judgment became final, a settlement was not consummated until April 17, 1941 (R. 258). This is borne out by a letter (R. 698) and the release (R. 699). Rogers testified that the settlement "was a fair bargain openly arrived at" (R. 305), and he refused to testify that Kelly caused him to waive any defense to the suit, or that he had any particular defense in mind (R. 306).

Eight subscribers[7] appeared by their attorneys and defended the suit on its merits. Mr. Gresham, the attorney for three of said subscribers, testified that he represented his clients to the best of his ability; that Mr. Kelly made no attempt to prevent him from defending the suit or from introducing evidence (R. 382). Mr. Gresham testified that Mr. Kelly refused to discuss settlement with him prior to trial (R. 384).

Petitioners stress Evans' testimony to the effect that he made an agreement with Mr. Kelly whereby he would not "press his defense" (R. 286), but on cross-examination he failed to identify any evidence that he held back (R. 294). He testified that he acted in good faith during the trial (R. 294). The proceedings (R. 219-237) show a vigorous defense by Mr. Evans.

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[7]T. B. Hill, Harry Joseph and Riddle Oil Co., represented by Willis Gresham of Austin; Nick Linz, represented by Elbert A. Boynton of Austin; William H. Balzen, Russell C. Crawford, Krisch & Lanham, Inc., and W. R. Thrailkill, represented by O. Shelley Evans of San Antonio (R. 219, 286, 382).

In connection with the testimony of Evans it should be remembered that he had had a dispute with the first receiver, and a controversy with the second receiver over salary and possession of company records (R. 292) resulting in hearings before the Master and the Court (R. 262). Mr. Kelly denied the alleged settlement (R. 262).

A partial transcript[8] of the class proceedings is in evidence, consisting of 54 pages of testimony (R. 219-237, 388-400, 448-472), 34 pages of defensive pleadings (R. 616-650); 64 exhibits were introduced. Disregarding for the moment the impossibility of saying that the record here shows the class was improperly represented in the original proceeding, since a material part of the original proceeding is not in evidence;[8] yet, it is submitted that the record introduced shows proper representation.

The trial court had before him the books and records of the Exchange, the reciprocal contracts, the testimony of its manager (R. 458) and two bookkeepers (R. 221, 388). The State Examiner, who had audited the reciprocal exchange for six consecutive years, also testified (R. 466) and produced his audits (R. 468). Mr. Kelly also testified (R. 232).

So thoroughly were the principal issues covered

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[8] Thirty (30) exhibits in the original proceeding were not introduced below. They are: Exhibits 7, 8, 9, 10, 11, 13, 15, 16, 17, 18 and 19 (R. 220-224); Exhibits 1, 2, 3a, 3b, 4, 5, 6a, 6b, 7a, 7b, 7c, 7d, 8a, 8b of Coleman's deposition (R. 394-397); Vaughan's Exhibit 32 (R. 463); McClain's Exhibits 40, 41, 42 and 43 (R. 468-469). All exhibits identified in these depositions were in evidence in 63,621 (R. 282-283). These exhibits included the books and records of the association and four audits by the State Examiner.

in the original proceeding that the petitioners below did not, and do not now, question the findings as to the extent of insolvency of the Exchange, the insolvency period, the necessity for the assessment, the amount of assessment, and the assessment period. They confined their attack on the assessment proceeding to the contention that the policies were non-assessable, a point they cannot and do not urge here.

When the decree became final, on April 9, 1941, the court authorized the receiver to settle claims for assessments (R. 739). Pursuant thereto, Mr. Kelly settled with eight parties to the class proceeding. He testified concerning each of these settlements (R. 253-260) and said "That is all of them" (R. 260). He also withdrew from the registry of the court the assessments paid in full by five other defendants.

Mr. Kelly was his own attorney in the class proceeding. It was not shown that his discussions with attorneys for the defendants were wrongful or improper.

It is respectfully submitted the petitioners have failed to prove wrongful conduct of the receiver causing improper representation of the class. The record fails to show improper representation of the class; it fails to show any possible defense available to the class. In fact petitioners' contention that the class was not properly represented boils down to the contention that a defense should have been urged although none was available.

Conclusion

It is respectfully submitted that no federal ques-

tion of substance is presented by the petition for writ of certiorari and that the petition should be denied.

Respectfully submitted,

MARION B. SOLOMON,
CHARLES L. BLACK,
JOHN W. STAYTON,
Counsel for Respondent,
Keith Kelly, Receiver.

APPENDIX

Article 8308:

SEC. 15. If the association, at the end of any calendar year, is not possessed of admitted assets in excess of unearned premiums sufficient for the payment of its incurred losses and expenses, it shall make an assessment for the amount needed to pay such losses and expenses, first upon the subscribers within each group whose earned premiums compared with its incurred losses and expenses show a deficiency for the group, and second only upon the subscribers within each group whose earned premiums compared with its incurred losses and expenses show a surplus, and in no event shall it make an assessment for any aggregate amount more than is needed to pay losses and expenses. Every subscriber shall, in accordance with the law and his contract, pay his proportionate part of any assessment which may be levied by the association on account of losses and expenses incurred during any calendar year while he is a subscriber.

SEC. 16a. Whenever the Association shall have accumulated, at the end of any calendar year, an admitted surplus in excess of incurred losses, expenses and unearned premiums or other liabilities amounting to the sum of Two Hundred Thousand Dollars ($200,000.00) or more, the liability of its members to assessment under Article 8308, Section 15, shall be suspended, and it shall be authorized to issue policies not subject to assessment. It shall be the duty of the Board of Insurance Commissioners to deter-

mine promptly after the filing of the annual Statement of the Association, whether or not such an amount of surplus exists and if it finds that it does, it shall so state in a certificate. Such certificate shall remain in full force and effect for one (1) year or until such time as a later report to or examination by the Department of Insurance shall show the surplus to be less than Two Hundred Thousand ($200,000.00) Dollars, whereupon the Board of Insurance Commissioners shall cancel and revoke such certificate and require the Association to issue policies subject to assessment under Article 8308, Section 15, as they were prior to the time when such surplus of Two Hundred Thousand ($200,000.00) Dollars or more was first accumulated.

SEC. 23. The association shall set up and maintain reserves adequate to meet anticipated losses, carry all claims to maturity and policies to termination, which reserves shall be computed in accordance with such rules as shall be approved by the Commissioner of Insurance and may be invested in such securities as are permitted to casualty companies organized under the General Laws; and, for the protection of its reserves and surpluses against the liability herein imposed, shall have the same right to reinsure or be reinsured as casualty companies organized under General Laws.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 288

SID W. RICHARDSON, ET AL

Petitioners,

VS.

KEITH KELLY, RECEIVER,

Respondent.

MOTION FOR REHEARING FOR PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

John M. Scott, Attorney at Law,
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Attorney for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 288

SID W. RICHARDSON, ET AL

Petitioners,

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Respondent.

MOTION FOR REHEARING FOR PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Now come Petitioners Sid W. Richardson, et al, and present their motion for rehearing to review the action of this Court in refusing their petition for writ of certiorari to the Supreme Court of Texas on January 7, 1947. The refusal of the petition was necessarily

predicated on the determination by the Court that *Christopher vs. Brusselback*, 302 U. S. 500, a case believed by Petitioners to be squarely controlling on similar facts, was erroneous or was distinguishable.[1]

The petition presented a basic constitutional question under the due process clause turning upon *Pennoyer vs. Neff* and *Christopher vs. Brusselback*. The case involves a question of great public importance in the administration of insolvent insurance companies, banks, and other corporations where the contention is made that the stockholders or members have a proprietorship obligation beyond their original investment. Petitioners submit that whether this Court considers *Christopher vs. Brusselback* erroneous, or whether it considers the instant case distinguishable, the importance of the due process question requires that this Court render its considered judgment on the merits. *Christopher vs. Brusselback* was the unanimous judgment of the Court, pronounced by Chief Justice Stone. Apparently, it controls the case at bar, so plainly, that the schoolboy author in *25 Texas Law Review 64*, so concluded. Chief Justice Alexander of the Supreme Court of Texas likewise so held. If *Christopher vs. Brusselback* does not control the case at bar, for whatever reason, the Court should so pronounce only by its written opinion in order that the basic right to a day in court guaranteed by the due process clause may be preserved. To portray the validity of this premise, an examination of the

[1]Respondent's suggestion that the decision below turns upon an adequate non-federal ground is completely answered in Petitioners' Reply Brief, Pages 5-7.

perspective of the litigation and its impact upon the due process clause are respectfully presented in this motion for rehearing. Our conviction is that the refusal of the petition is inconsistent with the written principles governing the jurisdiction and discretion of this Court.

In such a perspective, which we shall offer presently, it is plain that the case is a novelty in constitutional law affecting of itself the rights of more than 3,000 policyholders similarly situated to Petitioners, destroying by indirection the basic right to a day in court of many thousands of individuals not now directly involved, and upsetting without explanation the settled law of this Court pronounced in *Christopher vs. Brusselback*. Whatever Justice Stone said in that opinion will now be disregarded in the day-to-day handling of similar affairs, and not until this Court can be prevailed upon to again examine *Christopher vs. Brusselback*, will the ordinary citizen enjoy the benefit of the reasoned principles of due process laid down by an unanimous Court in that case.

The significance of the action of the Court upon the very ruling sought to be reviewed by the petition, the holding of the Supreme Court of Texas, is likewise startling. The Court below on May 2, 1945, handed down an unanimous opinion squarely holding that the judgment rendered in Cause No. 63621 was void. This Court will take judicial notice of the fact that following that opinion, and pursuant to a constitutional amendment adopted by the State of Texas, the Supreme Court of Texas was augmented by the

Commissioners of Appeal and became a nine-judge Court between May 2, 1945, and December 29, 1945, the date on which the judgment of the Court below now sought to be reviewed was rendered. As reflected by the Record, Page 801, the nine-judge Court withdrew the unanimous opinion which the Supreme Court of Texas had rendered on May 2, 1945, and substituted the opinion of December 29, 1945, to which the petition was directed. To this opinion Chief Justice James P. Alexander dissented in vigorous and almost scathing terms. The dissent is grounded in two principles. First, the Chief Justice of the Supreme Court of Texas held that the due process clause of the United States Constitution and the decisions of this Court thereunder squarely conflicted with the determination of the majority. In an extensive and carefully reasoned opinion the dissenting Chief Justice discussed the five due process pronouncements of this Court in point on the issue which preceded *Christopher vs. Brusselback*. He patterned the facts and principles in those cases into a logical and unanswerable setting for his examination of *Christopher vs. Brusselback*. He proceeded to take that decision and demonstrate more clearly than is within our power that the basic constitutional rights of the policyholders of the instant company to a day in court and the opportunity to present their defense had been negated by the majority of the Court below in evading *Christopher vs. Brusselback*.

The second principle in the dissenting opinion was that the very officer of the Court in the class suit had conducted the class suit without complying with

the requirements of good faith. While the dissenting Judge did not use the term "fraud," the facts set forth by him speak for themselves and fraud is redolent in the very warp and woof of the class suit.

Chief Justice Stone again speaking for an unanimous Court touched upon the requirement of good faith in a class suit in *Hansberry vs. Lee*, 311 U. S. 32. While that opinion within prescribed limitations recognized the validity of the class suit device (none of such limitations being applicable to the case at bar), it likewise renders mandatory the requirement of utmost good faith in the conduct of the class suit by those actually in Court. This Court has not yet defined the term "utmost fairness and good faith." By its refusal of the petition, however, on the facts reflected by the opinion of the Court below, this Court has inadvertently opened the dor to fraud in cases where a class suit would otherwise be proper. All that we have said and will say about the destruction of *Christopher vs. Brusselback* could likewise be reiterated with respect to *Hansberry vs. Lee.*

In such a background the petition for certiorari was filed. It reached this Court for submission on November 20, 1946. The printed record consisted of 863 pages reflecting more than six years of litigation, involving a judgment of $401,361.05 and interest thereon for six years, a judgment against more than 3,000 unnamed, uncited, unheard and undefended citizens. Following submission on November 20, 1946, an inaccurate reply brief was filed by Respondent on the 19th day of December, 1946. This reply brief

consisted in a large part of hastily drawn conclusions and inaccuracies of fact which if considered alone would impel this Court to refuse the petition. It necessitated a careful and accurate reply so that this Court in the press of its duties might not be led astray in the maze of the voluminous record. Petitioners prepared such a reply replete with exact references to the record. The effect of the reply brief of Petitioners was to completely refute and expose the legal and factual inaccuracies of the brief in opposition to the granting of the petition. Conscious that the detailing of the record required by our reply brief may have obscured the vital principle of constitutional law involved, we ask the Court to review the salient principal of law which is as definite and exact on these facts as the Pythagorean theorem is to the right triangle.

That principle succinctly stated is this:

The personal judgment rendered by the State Court against Petitioners and 3,000 other defendants without actual service of process is void. *Pennoyer vs. Neff*, 95 U. S. 715. The class suit device cannot be substituted for actual service of process in the instant case unless the applicable statute or an executed contract by the defendants sought to be bound expressly provided for the assessment device, so that it may be said that the defendants consciously and deliberately substituted the assessment device for their inherent constitutional right to have their personal liability judicially determined. *Christopher vs. Brussleback*, 302 U. S. 500; *Pink vs. AAA Highway Ex-*

press Co. 314 U. S. 201. The record affirmatively shows in the instant case that there was no statutory or contractual authorization for the assessment. It, therefore, follows that the judgment rendered without service of process against Petitioners and 3,000 other uncited defendants was void, as held by the dissenting Chief Justice of the Supreme Court of Texas.

To this Respondent suggested tenuous and unsubstantial distinctions between the instant case and *Christopher vs. Brusselback.* Those distinctions are analyzed separately, and separately destroyed, in the reply brief of Petitioners filed in this Court December 27, 1946, Pages 12 to 16. The second ground of resistance to the petition was that the Court below decided the case on a non-federal question to the effect that Petitioners had no meritorious defense. That ground of opposition is made in disregard of the express language of the Supreme Court of Texas,[2] and in contravention of the printed record protraying six years of litigation wherein Petitioners have struggled to present their meritorious defense to some Court, somewhere, sometime. That the meritorious defense exists and is valid is plainly evident from the fact that the Courts of Texas have so held in a similar case. See the discussion in Petitioners' reply brief, Page 7. That Respondent's whole opposition is fallacious and inaccurate is, we believe, established by the salient and undisputed facts set forth in the dissenting opinion of the Chief Justice of the Supreme Court of Texas.

[2]"We hold that the judgment in Cause No. 63621 was neither void nor voidable, therefore it is unnecessary for us to consider other questions raised by Petitioners." (R. 816).

The refusal of the petition by this Honorable Court, while not technically a precedent destroying *Christopher vs. Brusselback*, actually has that effect in the day-to-day application of the due process clause to insolvent reciprocal companies. The impact of the decision renders the conducting of a reciprocal insurance business by a solvent company impossible. Every policyholder runs the risk of untold and undetermined future liabilities, except where statutory limitations have been created, and the purchase of the policy is an invitation to fraud by rapacious would-be receivers.

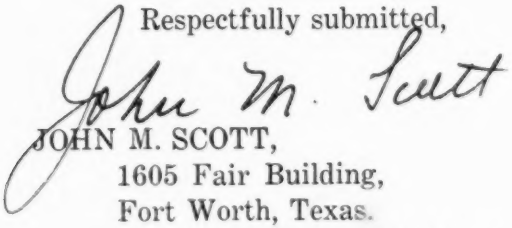
Convinced of the grave premises upon which this motion rests and solemnly conscious of the duty of counsel to make the character of statements herein contained advisedly and with candor, we respectfully submit this motion in the firm conviction that the action of the Court in refusing the petition was erroneous.

In the face of the dissenting opinion of the Chief Justice of the Supreme Court of Texas holding that *Christopher vs. Brusselback* governs the case at bar, and the evasive language of the majority of that Court in refusing to follow it, this Court should speak its declaration whether it be that *Christopher vs. Brusselback* is distinguishable, or invalid. Only upon the basis of an opinion by the Court can the due process clause and the guaranty it contains of a full and fair day in Court be cast in legal bronze. We are conscious of Cordozo's language, "Life has relations not always capable of division into inflexible com-

partments." But he was not speaking of the guaranties of due process.

It is of prime importance in our jurisprudence that those rights be exactly delineated and thus inhere in every daily transaction where they may be relevant. Constitutional rights concerning citation, notice, and the conduct of legal proceedings must not be surrounded by a penumbra of vagueness. The affairs of a troubled world demonstrate that freedom does not result from mere protestations of democracy and equal rights but rather in the translation of these abstractions to fixed and definite criteria of daily application. Only by writing upon the subject raised by this petition can the solemn responsibility of this Court to construe the Constitution be adequately discharged for the benefit of the people who live under it.

Respectfully submitted,



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 288

SID W. RICHARDSON, ET. AL.,
Petitioners,

vs.

KEITH KELLY, RECEIVER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

MOTION TO RETAX COSTS

JOHN M. SCOTT,
Counsel for Petitioner.

SAM DARDEN,
SAM R. MERRILL,
MILBURN E. NUTT,
WILLIAM M. BROWN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 288

SID W. RICHARDSON, ET. AL.,

Petitioners.

vs.

KEITH KELLY, RECEIVER,

Respondent

MOTION TO RETAX COSTS

To the Honorable, the Supreme Court of the United States:

Now come Sid W. Richardson, et al., Petitioners in the above styled and numbered cause and file this their motion to retax the costs in the above captioned case in which petition for writ of certiorari to the Supreme Court of Texas has been refused and as grounds for such motion would respectfully show:

That at the time the certified transcript of the record was forwarded to the Clerk of this Court and prior to the time said record had been printed, these Petitioners entered into a stipulation and agreement with the Respondent in said cause concerning the portions of the transcript which were to be printed.

Petitioners, in preparing their petition for writ of certiorari, confined themselves solely to the federal question involved, to-wit, the question arising under the due process clause of the Fourteenth Amendment to the Constitution of the United States and requested to be printed only that portion of the record relevant to the federal question, omitting all portions of the record pertaining to the question of meritorious defense, believing that question to be

one over which this Honorable Court had no jurisdiction to pass.

The Respondent requested that additional portions of the transcript be included in the printed record as per the stipulation entered into between Petitioners and Respondent attached to this motion.

Petitioners now respectfully request the Clerk of this Court to retax the costs incurred in this cause and require the Respondent to pay that portion of the costs incurred by reason of the additional printed matter.

WHEREFORE, premises considered, Petitioners pray that under the provisions of Rule 38(8) of the Supreme Court of the United States, this Honorable Court make an appropriate order requiring Respondent to pay the costs of printing those portions of the record unnecessary for the consideration of this Court as reflected by the attached stipulation.

Respectfully submitted,

JOHN M. SCOTT,
1605 Fair Building,
Fort Worth, Texas,
Attorney for Petitioners;
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Waco, Texas;
SAM R. MERRILL,
Bankers Mortgage Bldg.,
Houston, Texas;
MILBURN E. NUTT,
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Wichita Falls, Texas;
WILLIAM M. BROWN,
1605 Fair Building,
Fort Worth, Texas,
Of Counsel.

THE STATE OF TEXAS,
County of Tarrant:

Before Me, the undersigned authority, a Notary Public in and for Tarrant County, Texas, on this day personally appeared John M. Scott, attorney for Petitioners in the above captioned cause, who after being duly sworn stated that the matters set forth in the foregoing motion are true and correct.

EDNA COOK,
[SEAL.] *Notary Public in and for Tarrant County, Texas.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 288

SID W. RICHARDSON, ET AL.,

Petitioners,

vs.

KEITH KELLY, RECEIVER,

Respondent

It is stipulated and agreed by the interested parties, Petitioners and Respondent, that the attached list of matters which have been included in the printed record, have been included at the instance and request of the Respondent; that such matters were omitted from the designation prepared by Petitioners herein because such matters were not deemed pertinent nor relevant to the Federal questions involved, and that, notwithstanding the stipulation of matters to be included in the printed record which has been filed with the Clerk of the Supreme Court of the United States, Petitioners here reserve the right, and shall be allowed to urge that the costs of printing the additional matter shall be taxed against the Respondent.

Dated this the 6th day of May, A. D. 1946.

SLEEPER, BOYNTON, DARDEN & BURLESON,
MILBURN E. NUTT,
SAMUELS, BROWN, HERMAN & SCOTT,
MERRILL & SCOTT,
By JOHN M. SCOTT,
Attorneys for Petitioners;
MARION B. SOLOMAN,
Attorney for Respondent.

In addition to the matters requested to be printed by petitioners, the following items have been included in the stipulation at the request of the respondent:

I

Matters Appearing in Statement of Facts

1. Page 3.
2. Page 9 through 13.
3. Page 14, omitting conversation between attorneys.
4. The introduction of Exhibits 23 and 24 on page 16 should be printed.
5. Page 18 through 50.
6. Page 170 through 173, and first paragraph 174.
7. That portion of the deposition of Oran Speer appearing on first behalf of page 276.
8. Page 290 through 297.
9. Page 327 and 328, the first six interrogatories and answers of K. C. Gray.
10. Pages 337 and 338, interrogatories 35 and 36, and answers thereto.
11. Pages 343 through 346.
12. Pages 347 through 349.
13. Page 350, omitting argument and objection of counsel.
14. Pages 351 through 356.
15. Pages 357 through 371, omitting argument and objections of counsel.
16. Pages 491 through 493.
17. Pages 494 through 500.
18. Pages 503 through 518.
19. Pages 528 through 530, omitting argument and objections of counsel.
20. Pages 530 through 562.
21. Pages 563 through 566, omitting argument and objection of counsel.

22. Pages 567 through 600.

23. Pages 601 through 674.

24. Pages 678 through 717, and testimony of Herbert Marshall.

II

Exhibits

1. Plaintiffs' Exhibits 9 through 24, being pleadings in cause No. 63621.

2. Plaintiffs' Exhibits 29 through 38, being pleadings in cause No. 63621.

3. Defendants' Exhibits 2 and 3, being correspondence with Rogers and release.

4. Defendants' Exhibits 12 through 18, being applications to transact business, and certified copies of portions of annual statements.

5. Defendants' exhibits 32 through 36, consisting of permits to transact business.

6. Defendants' Exhibit 124.

7. Defendants' Exhibit 125.

8. Defendants' Exhibits 39, 40, 43 and 44.

9. Defendants' Exhibits 45 and 46.

10. Defendants' Exhibits 58 and 59.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 288

SID W. RICHARDSON, ET AL, *Petitioners*

VS.

KEITH KELLY, *Respondent*

RESPONDENT'S REPLY TO MOTION TO RETAX COSTS

MARION B. SOLOMON,
CHARLES L. BLACK
JOHN W. STAYLTON,
Counsel for Respondent,
Keith Kelly, Receiver.

R. Duncan & Co., Brief Printers, Dallas

IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 288

SID W. RICHARDSON, ET AL, *Petitioners*

VS.

KEITH KELLY, *Respondent*

RESPONDENT'S REPLY TO MOTION TO RETAX COSTS

To the Honorable the Supreme Court of the United States:

At the time the parts of the record were designated for printing, the petitioners had not filed a designation of the points upon which they intended to rely. The duty devolved upon the respondent to designate for printing the portons of the record which might be material to the points that the petitioners *might* raise and which, likewise, might

be material to the points that respondent might advance in reply thereto.

The question of due process involved the propriety of the class suit device as a means of assessing the members of this reciprocal exchange. The propriety of the class suit depended upon the relationship between the members of that exchange. That relationship was governed by the reciprocal contracts used at the exchange, the powers of attorney and the insurance policies. The construction placed upon those instruments by the subscribers themselves in their applications to the Board of Insurance Commissioners for permits and in their sworn statements to the Board was material. The manner in which the exchange carried on its operations was material on this question. We designated additional portions of the record which we considered material to these issues.

Items 6 and 8 (R. 318-320, R 323-328) pertain to the reciprocal contracts and the insurance policies. Designations 12 through 15 (R. 351-365) and designation 17 (R. 366-370) deal with the nature of this reciprocal exchange and the regulations of the Board of Insurance Commissioners applicable thereto. Designation 18 (R. 371-382) deals with applications to the Board and sworn representations made to the Board. Designation 19 (R. 388) pertains to notices given by these subscribers to the Industrial Accident Board pertaining to their insurance. Designations 20, 21 and 22 (R. 388-418 and R. 420-434)

deal with the manner in which the exchange operated. Designation 24 (R. 482-492) and (R. 503-506) deals with the powers of attorney, subscribers agreements and policies of insurance held by the plaintiffs and intervenors and also deals with the nature of the operations (R. 506-508). Petitioner Gray's testimony was material because it was contrary to the theory on class suits urged in the application to this court (Designations 9-11, R. 347-351).

One answer to the petitioners' contentions regarding due process was that they had had their day in court in the instant proceeding; that in the instant proceeding the court reaffirmed the question of their liability as subscribers. It was thought that the rules of due process do not require that a party be given two chances to try his lawsuit, and the fact that the petitioners was accorded a full hearing below on the issue of their liability was a complete answer to the question of due process. This made it necessary that the record show the full hearing accorded them on the issue of their liability.

Those portions of the record pertaining to the liability of the subscribers were material for the further reason of showing the lack of substance in the petition for certiorari. This showed that the petitioners were arguing over merely a question of procedure. It showed that the judgment under attack was correct on the merits.

Petitioners' statement in their motion that they omitted "all portions of the record pertaining to the question of

meritorious defense" is an admission that their designation was insufficient. The question of meritorious defense cannot be separated from the nature of their reciprocal undertaking. As a matter of fact, the petitioners themselves, in their reply to respondent's brief, asked this court to construe their reciprocal undertaking (Reply p. 12).

The petitioners took the position that the original class proceeding was void because of the wrongful conduct of the receiver. They contended that the receiver prevented the class representatives from properly representing the class. This opened up the question of whether or not there was any defense on behalf of the class that could have been urged by the class representatives, thereby rendering material those portions of the record pertaining to defense.

In anticipation of the petitioners attack on the proceedings in cause No. 63621 and upon the receiver, and upon the plaintiff in that cause, and upon the class representatives, defendants in that cause, we considered it proper that the portions of the record pertaining to that proceeding be printed. This included the pleadings of the class representatives (Designations 2-4; R. 213-218; R. 608-652); it also included the testimony before the court in that cause (Designation 5; R. 219-240); (Designation 20; R. 388-400); (Designation 23; R. 449-472); and the exhibits introduced in the class proceeding (Designation 24; R. 472-480). This included the powers of attorney of the class representatives (R. 503-506) and the nature of

the operations of the exchange (R. 506-508). We also considered material the representations the subscribers made to the Board of Insurance Commissioners and the sworn statements in which they construed their contracts and stated the nature of their obligations upon which they obtained their permits; consequently, we designated such portions of the record (R. 700a-718; R. 720-728).

This evidence was material to the criticism directed at the class representatives because the assessment decree was in line with these sworn statements. The class representatives were bound by these statements, as well as the petitioners herein.

Petitioners severely criticised the receiver in their petition for certiorari. In anticipation thereof, we requested those portions of the record which might rebut this criticism. This included the receiver's applications to the court and the instructions issued to him by the court (Designation 23; R. 435-446) authorizing certain collections (R. 749); authority and order to compromise assessments (R. 736-739); and report of settlements and approval thereof (R. 741-746). The receiver's notice to all subscribers (R. 748b) issued long prior to the assessment suit, as well as his application to bring suit (R. 732) and the authority to do so (R. 734) are all material on the issue of whether or not the receiver was acting covertly as was charged. It was also material to show the nature of the proceedings that has been filed against the association (R.

690) and the fact that the subscribers had answered in that cause (R. 731). This evidence showed that the subscribers were in court in the original receivership proceedings and were required to take notice of the aforesaid orders and directions.

In this connection we also requested the record (R. 319-320) pertaining to the powers of attorney and petitioners' statement of the theory of their case. This shows that petitioners stated that the receiver based his suit upon a superseded power of attorney. This rendered material the record showing that this power of attorney was not superseded, but was being used by petitioners themselves (R. 482). Additional portions (R. 482-492) were material because they pertained to the policies of insurance held by the plaintiffs and intervenors. The testimony of the present receiver (R. 493-502) is material on the question of wrongful conduct and also on the question of the operation of the exchange and the state of its records. The letter and release (R. 698-699) threw a material light upon the receiver's dealings with Rogers and were therefore, material on the issue of wrongful conduct.

The failure of petitioners to designate the material portions of the record dealing with the aforesaid issues made necessary the request by the respondent. This respondent denies the designation of any unnecessary parts of the record for printing. He was commanded to designate the material parts of the record for the court's consideration,

Rule 38 (8). This record will show that your respondent cooperated with the petitioners in shortening the record by stipulating to the contents of 59 exhibits and to the omission of a large portion of the record below (R. 855-863).

WHEREFORE, your respondent prays that the motion to retax costs be denied.

MARION B. SOLOMON,
CHARLES L. BLACK
JOHN W. STAYLTON,
Counsel for Respondent,
Keith Kelly, Receiver.